South Carolina Law Review

Volume 65 | Issue 2 Article 4

Winter 2013

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TOWARD A BETTER UNDERSTANDING OF RIPENESS AND FREE SPEECH CLAIMS

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At first glance, ripeness is a simple concept. Yet, in its nuances, the doctrine is complex and uncertain. One aspect of the doctrine that has gained a consensus among courts and scholars is that, in free speech cases, the standard ripeness test is relaxed. This relaxed standard is justified on the grounds that free speech is critical to a democratic society and that courts cannot permit any potential chilling effect on free speech to stand.

Yet this lower ripeness standard for free speech cases is not as sound as courts and scholars believe, and this Article rejects the validity of this lower standard as undeserved, unnecessary, and unclear. First, free speech cases do not deserve a lower ripeness standard because such a standard suggests that other equally important rights—including the right to be free from unreasonable searches, the right to just compensation when the government takes one's property, and the right to vote—are not as critical as the right to free speech. Second, free speech cases do not need a lower ripeness standard because the normal test for ripeness, which looks to the fitness of the issue for judicial review and the hardship to the parties of withholding review, provides adequate protection for anyone seeking to challenge a law under the Free Speech Clause of the First Amendment. And third, even assuming that free speech cases deserve and need a lower ripeness standard, the current doctrine lacks precision regarding how the standard should be lowered. These three reasons lead to the conclusion that the consensus on the lower ripeness standard for First Amendment cases is not justified, and this Article calls for courts to apply the standard ripeness test to free speech cases.

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I. INTRODUCTION

First Amendment cases are often among the most captivating cases.[1] The public and legal scholars eagerly await judicial decisions in high profile First Amendment cases.[2] In America's increasingly litigious society,[3] some high profile free speech case always seems to appear in the news.[4]

A fundamental principle of the federal courts is that they are courts of limited jurisdiction, capable of exercising only the power granted to them by

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1. Presumably, First Amendment cases attract attention for many reasons. My theory is that Americans are interested in First Amendment cases because the First Amendment is championed as one of the people's most fundamental rights, and the basic idea—freedom of speech—is relatively accessible, even if the nuances of First Amendment jurisprudence are not.

2. Consider the media reaction to several of the most highly anticipated First Amendment cases recently decided by the Supreme Court. *See, e.g.*, Citizens United *Round-Up: Morning Edition*, SCOTUSBLOG (Jan. 21, 2010), http://www.scotusblog.com/2010/01/citizens-united-round-up-morning-edition/ (providing links to reactions in the media after the Supreme Court decided *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010)); Adam Liptak, *Justices Take Up Funeral-Protest Case*, N.Y. TIMES, Oct. 7, 2010, at A21 (discussing the arguments in *Snyder v. Phelps*, 131 S. Ct. 1207 (2011)).

3. *See, e.g.*, Marin K. Levy, *Judicial Attention as a Scarce Resource: A Preliminary Defense of How Judges Allocate Time Across Cases in the Federal Court of Appeals*, 81 GEO. WASH. L. REV. 401, 407–09 (2013) (citing Carolyn Dineen King, Commentary, *A Matter of Conscious*, 28 HOUS. L. REV. 955, 956–57 (1991); Charles Alan Wright, *The Overloaded Fifth Circuit: A Crisis in Judicial Administration*, 42 TEX. L. REV. 949, 956–57 (1964); PAUL D. CARRINGTON ET AL., JUSTICE ON APPEAL 143–46 (1976)) (describing the rising caseload in federal district courts); Marin K. Levy, *The Mechanics of Federal Appeals: Uniformity and Case Management in the Circuit Courts*, 61 DUKE L.J. 315, 321–22 (2011) (citing COMM'N ON STRUCTURAL ALTS. FOR THE FED. COURTS OF APPEALS, FINAL REPORT 14 tbl.2-3 (1998)) (describing the rising caseload of the federal circuit courts).

4. *See, e.g.*, Katherine Long, *Court Rules for Free Speech in Former WSU Professor's Lawsuit*, SEATTLE TIMES (Sept. 5, 2013), http:seattletimes.com/html/localnews/2021764491_wsulawsuitxml.html (discussing a case dealing with a state university professor's free speech rights).

Article III of the Constitution.[5] One jurisdictional requirement is ripeness, which "is peculiarly a question of timing."[6] As one scholar notes, the ripeness "doctrine seeks to separate matters that are premature for review because the injury is speculative and never may occur, from those cases that are appropriate for federal court action."[7]

Although the basic concept of ripeness is simple enough, the doctrine itself "remains a confused mix of principle and pragmatic judgment."[8] Ripeness has been rooted in both Article III requirements and prudential considerations, yet without a clear indication of what role these different considerations play.[9] What is clear—at least according to the consensus reached by the majority of federal circuit courts—is that the ripeness standard is relaxed in the First Amendment context.[10] Notably, however, the Supreme Court has never taken up this question, and given the lack of a circuit split, the Court does not seem poised to address this issue.[11]

Likewise, despite this consensus—or perhaps because of it—no scholar has carefully considered whether the relaxed ripeness standard makes sense.[12] Instead of offering careful analysis, existing scholarship generally accepts this conclusion and offers the same justifications provided by courts, without delving further into the issue.[13] Therefore, this Article challenges the accepted, yet

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5. *See* Lance v. Coffman, 549 U.S. 437, 439 (2007) (per curiam) ("Article III of the Constitution limits the jurisdiction of federal courts to 'Cases' and 'Controversies.'"); *see also* Ry. Mail Ass'n v. Corsi, 326 U.S. 88, 93 (1945) ("The conflicting contentions of the parties in this case as to the validity of the state statute present a real, substantial controversy between parties having adverse legal interests, a dispute definite and concrete, not hypothetical or abstract.").

6. Buckley v. Valeo, 424 U.S. 1, 114 (1976) (per curiam) (quoting Reg'l Rail Reorganization Act Cases, 419 U.S. 102, 140 (1974)).

7. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 92 (3d ed. 2009).

8. Sierra Club v. Yeutter, 911 F.2d 1405, 1410 (10th Cir. 1990).

9. *See, e.g.*, Nat'l Park Hospitality Ass'n v. Dep't of Interior, 538 U.S. 803, 808 (2003) ("The ripeness doctrine is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction." (quoting Reno v. Catholic Soc. Servs., 509 U.S. 43, 57 n.18 (1993))).

10. *See infra* Part III.B.

11. *See infra* notes 173–84 (discussing the federal courts of appeals that have upheld the lower ripeness standard for free speech cases); *see also* Sindicato Puertorriqueno v. Fortuno, 699 F.3d 1, 9 (1st Cir. 2012) (discussing the relaxed ripeness standard and rejecting a defendant's argument to add additional requirements).

12. At least one scholar has defended the relaxed standard, but this analysis only delves so deep into the considerations that are fleshed out in this Article. *See* 13B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3532.3, at 515–534 (3d ed. 2012) (analyzing the need for the relaxed ripeness requirement for First Amendment rights and arguing that other rights should also receive the special treatment).

13. *See, e.g.*, William Maker, Jr., *What Do Grapes and Federal Lawsuits Have in Common? Both Must be Ripe*, 74 ALB. L. REV. 819, 832 n.124 (2011) (citing Rivendell Winery, L.L.C. v. Town of New Paltz, 725 F. Supp. 2d 311, 319 (N.D.N.Y. 2010); Dougherty v. Town of N. Hempstead Bd. of Zoning Appeals, 282 F.3d 83, 90 (2d Cir. 2002)) (pointing out cases that quickly accept the relaxed standard without questioning its validity).

unexamined consensus, examining the soundness of lowering the ripeness requirement in First Amendment cases.[14]

One important note should be made here: although courts typically describe the lower ripeness standard as applying "in the First Amendment context,"[15] what courts actually mean is that the standard applies to cases invoking the Free Speech Clause of the First Amendment.[16] The First Amendment obviously provides additional protections for religion, the press, petition, and assembly.[17] The lower ripeness standard does not appear to have been applied—at least not with any frequency—to First Amendment cases invoking these other protections.[18] In this Article, I use the same vernacular as the courts, referring often to First Amendment cases when the context is, more specifically, free speech cases. At times, however, I use the term *free speech cases*; thus, throughout the Article, *First Amendment* and *free speech* should be treated synonymously—a use of terms that should not be confusing.

Ultimately, this Article rejects the relaxed ripeness standard on two grounds. First, free speech rights do not deserve or need a relaxed ripeness standard. Free speech rights do not deserve the lower standard because lowering the bar for a ripe dispute only in First Amendment cases elevates these rights above other constitutional guarantees. Although the First Amendment is important, other constitutional rights also protect fundamental American values. Additionally,

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14. The First Amendment obviously encompasses different rights—freedom of speech, freedom of the press, freedom of religion, freedom of assembly, and freedom of petition. *See* U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or of abridging the freedom of the speech, or of the press; or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."). Most of the cases involving ripeness invoke freedom of speech, but theoretically, the analysis in this Article could apply to other First Amendment rights as well. *See* Geneva College v. Sebelius, 929 F. Supp. 2d. 402, 430 (W.D. Pa. 2013) (declining to draw a distinction between the First Amendment rights a corporation has in the context of standing, stating "there is no contextual distinction in the language of the First Amendment between freedom of speech and freedom to exercise religion"), *aff'd on reconsideration in part*, Memorandum Opinion and Order, No. 2:12-cv-00207 (W.D. Pa. May, 8, 2013). *See generally* Steven J. Willis, *Corporations, Taxes, and Religion: The* Hobby Lobby *and* Conestoga *Contraceptive Cases*, 65 S.C. L. REV. 1, 16–23 (2013) (providing an in-depth analysis of whether a corporation has standing to bring a freedom of religion action on behalf its shareholders).

15. *See, e.g.*, *Dougherty*, 282 F.3d at 90 ("In addition, in the [F]irst [A]mendment context, the ripeness doctrine is somewhat relaxed."). On occasion, however, courts have been more specific. *See, e.g.*, Sullivan v. City of Augusta, 511 F.3d 16, 31 (1st Cir. 2007) (stating that "when free speech is at issue, concerns over chilling effect call for a relaxation of ripeness requirements" (citing El Dia, Inc. v. Hernandez Colon, 963 F.2d 488, 496 (1st Cir. 1992))).

16. U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . . .").

17. *Id.* ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.").

18. *See, e.g.*, Roman Catholic Bishop of Springfield v. City of Springfield, 724 F.3d 78, 90 n.10 (1st Cir. 2013) (declining to resolve the question of whether the relaxed ripeness standard in the First Amendment context applies to free exercise claims).

First Amendment rights do not need a lower standard because the normal ripeness analysis is sufficient to protect these rights. Second, even if First Amendment rights may be considered worthy of greater protection than other constitutional rights, the current consensus lacks precision in its language and operation, thereby ignoring and potentially undermining the constitutional basis of ripeness.

This Article proceeds in three parts. Part II offers an introductory discussion of the ripeness doctrine. It starts by describing the test for determining whether a case is ripe and then analyzes whether ripeness is a constitutional or prudential doctrine, ultimately concluding that ripeness has a dual foundation based on both the Constitution and prudential considerations.

Part III turns to ripeness in the context of First Amendment cases. Part III.A describes the ways in which a plaintiff can style a First Amendment claim, including an assertion of overbreadth, vagueness, or prior restraint; an as-applied challenge; or a challenge to a law's neutrality. With this background, Part III.B examines the consensus that circuit courts have reached and the scholarly recognition of this consensus; this examination is followed by a discussion of the rationale for the relaxed ripeness standard offered by the courts.

Finally, Part IV explains why the lower ripeness standard is misguided, despite the consensus it has attained. Part IV.A challenges the basic assumption that First Amendment values are more important than other constitutional rights such that they should be heard in federal court more readily than cases involving other rights. It argues that First Amendment rights neither deserve nor need such a standard. Additionally, Part IV.B shows that, even accepting the premise that First Amendment cases should have a lower ripeness standard, the lower ripeness standard is imprecisely defined and risks undermining the ripeness doctrine more generally. Ultimately, this Article concludes that courts should apply the same ripeness test in free speech cases that courts apply in all other cases.

II. RIPENESS

Ripeness is the requirement that "a dispute has . . . matured to a point that warrants decision."[19] As Professor Kenneth Culp Davis puts it, "The basic

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19. Auto., Petroleum & Allied Indus. Emps. Union, Local 618 v. Gelco Corp., 758 F.2d 1272, 1275 (8th Cir. 1985); *see also* BLACK'S LAW DICTIONARY 1442 (9th ed. 2009) (defining ripeness as the requirement that a case "has reached, but has not passed, the point when the fact have developed sufficiently to permit an intelligent and useful decision to be made").

Ripeness is closely related to other justiciability doctrines, particularly the doctrine of standing. *See generally* RICHARD H. FALLON ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM (6th ed. 2009) (showing in the Table of Contents that the ripeness doctrine is one section in the chapter on justiciability).

On the other hand, ripeness is distinguished from other justiciability doctrines in that "ripeness is peculiarly a question of timing." *See* Reno v. Catholic Soc. Servs., Inc., 509 U.S. 43, 73 (1993) (O'Connor, J., concurring in the judgment) (quoting Reg'l Rail Reorganization Cases, 419 U.S. 102,

principle of ripeness is easy to state: Judicial machinery should be conserved for problems which are real and present or imminent, not squandered on problems which are abstract or hypothetical or remote."[20] The idea of ripeness is an old concept in American law. In 1835, Chief Justice Marshall first used the word "ripe" to describe a case as suitable for judicial decision in *Life & Fire Insurance Co. of New York v. Adams*.[21] Although the definition and concept of ripeness seem simple enough, what exactly ripeness means in real cases is far more complicated.[22]

This Part seeks to unpack the doctrine of ripeness. Part II.A describes the two-prong test that the Supreme Court has established for determining when a case is ripe. Part II.B then delves into the question of the basis for ripeness: whether the requirement is constitutional or prudential.

A. The Test

Whether a case is ripe for judicial review is determined by a two-pronged test, which the Supreme Court established in *Abbott Laboratories v. Gardner*[23] in 1967; this test is now widely accepted by lower federal courts[24] and scholars.[25] The first prong analyzes "the fitness of the issues for judicial decision," and the second prong examines "the hardship to the parties of withholding court consideration."[26] In describing how this test is applied, the D.C. Circuit has stated, "Like other legal inquiries, application of this test is by no means an exact

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140 (1974)); *see also* Thomas v. Anchorage Equal Rights Comm'n, 220 F.3d 1134, 1138 (9th Cir. 2000) (en banc) (observing that "ripeness can be characterized as standing on a timeline"). Essentially, ripeness asks: "Is this the right time for the plaintiff to bring this case?" while standing asks: "Is this the right plaintiff to bring this case?" *See* F. Andrew Hessick, *Probalistic Standing*, 106 Nw. U. L. REV. 55, 63 (2012) (discussing the difference between ripeness and standing).

20. Kenneth Culp Davis, *Ripeness of Governmental Action for Judicial Review*, 68 HARV. L. REV. 1122, 1122 (1955).

21. 34 U.S. 573, 604 (1835).

22. *See, e.g.*, State Farm Mut. Auto. Ins. Co. v. Dole, 802 F.2d 474, 479 (D.C. Cir. 1986) (noting that the test for ripeness "is by no means an exact science").

23. 387 U.S. 136, 149 (1967), *abrogated on other grounds by* Califano v. Sanders, 430 U.S. 99 (1977).

24. *See, e.g.*, Nat'l Rifle Ass'n of Am. v. Magaw, 132 F.3d 272, 280 (6th Cir. 1997) (citing *Abbott Laboratories*, 387 U.S. at 148) (applying the two-pronged test from *Abbott Laboratories*); Ernst & Young v. Depositors Econ. Prot. Corp., 45 F.3d 530, 535 (1st Cir. 1995)) (stating that questions of ripeness are gauged under the *Abbott Laboratories* two-pronged test); United States v. Shipley, 825 F. Supp. 2d 984, 989 (S.D. Iowa 2011) (citing Droney v. Fitch, No. 4:10-CV-114, 2011 WL 890704, at *6 (E.D. Mo. Mar. 14, 2011)) (explaining the two-pronged analysis of ripeness); Tait v. City of Philadelphia, 639 F. Supp. 2d 582, 589 (E.D. Pa. 2009) (citing *Abbott Laboratories*, 387 U.S. at 149) (explaining that when applying the *Abbott Laboratories* two-pronged test to determine whether a case is ripe, courts must "evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration").

25. *See, e.g.*, Matthew D. Adler, *Rights Against Rules: The Moral Structure of American Constitutional Law*, 97 MICH L. REV. 1, 168 & n.587 (1998) (citing *Abbott Laboratories*, 387 U.S. at 149) (discussing the two-pronged test from *Abbott Laboratories*).

26. *Id.* at 168 (citing *Abbott Laboratories*, 387 U.S. at 149).

science; nor is it to be a matter of weaving complicated legal distinctions divorced from reality. . . . It requires, rather, the exercise of practical common sense . . . ."[27]

Generally, both of these prongs must be satisfied for a case to be ripe.[28] Although a plaintiff must show that both prongs are met, "a strong showing on one may compensate for a weak one on the other."[29] Despite this prevailing view, "[t]he relationship between these two parts of the test—fitness and hardship—has never been precisely defined."[30] Supreme Court cases suggest that the prevailing view is correct: the Court has refused to decide cases with pure legal questions when the parties would face no hardship if the case was not decided[31] and, likewise, has refused to decide cases lacking a clear dispute.[32] These Supreme Court cases suggest that the argument from some scholars—such as Professor Laurence Tribe[33]—that only one prong is necessary for a case to be ripe is not as strong as the position that the plaintiff must make at least some showing on both prongs.[34]

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27. State Farm Mut. Auto. Ins. Co. v. Dole, 802 F.2d 474, 479 (D.C. Cir. 1986) (internal quotation marks omitted).

28. *See* Cedars-Sinai Med. Ctr. v. Watkins, 11 F.3d 1573, 1581 (Fed. Cir. 1993) ("Both prongs must be satisfied before an Article III court may apply its adjudicative powers to a case's merits."); Prod. Credit Ass'n of N. Ohio v. Farm Credit Admin., 846 F.2d 373, 375 (6th Cir. 1988) ("For a claim to be ripe, both prongs of the ripeness test must be satisfied for us to exercise jurisdiction.").

29. McInnis-Misenor v. Me. Med. Ctr., 319 F.3d 63, 70 (1st Cir. 2003). In another case, the First Circuit suggested that a "weak" showing on one prong might be so weak as to be even "questionable." *See* Ernst & Young v. Depositors Econ. Prot. Corp., 45 F.3d 530, 535 (1st Cir. 1995) ("[W]e acknowledge the possibility that there may be some sort of sliding scale under which, say, a very powerful exhibition of immediate hardship might compensate for questionable fitness (such as a degree of imprecision in the factual circumstances surrounding the case), or vice versa.").

30. *Ernst & Young*, 45 F.3d at 535.

31. *See, e.g.*, Poe v. Ulman, 367 U.S. 497, 508–09 (1961) (withholding adjudication because the plaintiff challenged a criminal statute that had never been enforced).

32. *See, e.g.*, Renne v. Geary, 501 U.S. 312, 320–23 (1991) (citing O'Shea v. Littleton, 414 U.S. 488, 495–96 (1974); Rescue Army v. Mun. Ct. of L.A., 331 U.S. 549, 584 (1947); Babbitt v. Farm Workers Nat'l Union, 442 U.S. 289, 306 (1979); Longshoremen v. Boyd, 347 U.S. 222, 224 (1954)) (denying standing because the respondents failed to demonstrate a live dispute).

33. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 80 (2d ed. 1988). The D.C. Circuit appears to take an approach that could be consistent with Professor Tribe's view. Under D.C. Circuit precedent:

> [I]f the court has doubts about the fitness of the issue for judicial resolution, it will balance the institutional interests in postponing review against the hardship to the parties that will result from delay. Nonetheless, where . . . there are no significant agency or judicial interests militating in favor of delay, lack of hardship cannot tip the balance against judicial review.

Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs, 440 F.3d 459, 465 (D.C. Cir. 2006) (citing Nat'l Mining Ass'n v. Fowler, 324 F.3d 752, 756–57 (D.C. Cir. 1990)) (internal quotations marks and alterations omitted).

34. *See, e.g.*, David Floren, Comment, *Pre-enforcement Ripeness Doctrine: The Fitness of Hardship*, 80 OR. L. REV. 1107, 1112 (2001) (citing TRIBE, *supra* note 33, at 80; ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 2.6.3, at 102 (1997))

1. Fitness of the Issue for Judicial Review

Under the first prong, a case is fit for judicial review when the parties "present a real, substantial controversy [with] adverse legal interests . . . ."[35] The parties have adverse legal interests when the parties have conflicting cognizable legal claims.[36] These conflicting claims must be in a dispute that is concrete, not merely "hypothetical or abstract."[37]

Some types of cases generally meet this fitness requirement. For example, cases that present pure questions of law[38] are more likely to be ripe.[39] The D.C. Circuit has aptly explained why cases presenting pure legal questions are likely ripe, writing that nothing more could happen that "would bring the issues into greater focus or assist [a court] in determining them."[40] For instance, in *Abbott*

("Normally both fitness and hardship are necessary before a case is considered to be ripe."). Ultimately, however, the resolution of this issue is not critical to the argument in this Article.

35. *Babbitt*, 442 U.S. at 298 (quoting Ry. Mail Ass'n v. Corsi, 326 U.S. 88, 93 (1945)). Put another way, this prong is "the requirement that issues be sufficiently clarified before a court may be expected to decide them." Davis, *supra* note 20, at 1134.

36. *See, e.g.*, Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240–42 (1937) (citations omitted) (holding that adverse legal interests existed when parties claimed opposing legal rights under a contract).

37. *Babbitt*, 442 U.S. at 298 (quoting *Corsi*, 326 U.S. at 93). A seemingly obvious part of this requirement—but a point worth making given the claims made by some plaintiffs—is that *dispute* means the parties must actually disagree about the legal result of the issue in controversy. When the parties agree on the outcome under the law, no dispute exists. *See, e.g.*, Wis. Right to Life, Inc. v. Paradise, 138 F.3d 1183, 1185, 1187–88 (7th Cir. 1998) (holding that no justiciable case existed because the plaintiff and state officials all agreed that a Wisconsin law regulating political action committees did not apply to the plaintiff and that the plaintiff could not face prosecution under the law).

38. *See* Immigration & Naturalization Serv. v. St. Cyr, 533 U.S. 289, 298 (2001) (holding that a case presents a question of law when the parties agree on the facts of the case but disagree on the legal conclusion).

39. *See, e.g.*, Pub. Water Supply Dist. No. 10 of Cass Cnty., Mo. v. City of Peculiar, Mo., 345 F.3d 570, 573 (8th Cir. 2003) ("The case is more likely to be ripe if it poses a purely legal question and is not contingent on future possibilities."); San Diego Cnty. Gun Rights Comm. v. Reno, 98 F.3d 1121, 1132 (9th Cir. 1996) (citing Freedom to Travel Campaign v. Newcomb, 82 F.3d 1431, 1434–35 (9th Cir. 1996)) ("[P]ure legal questions that require little factual development are more likely to be ripe."); *see also* Floren, *supra* note 34, at 1109 ("For issues raised in the controversy to be fit for resolution by the court, they should be largely legal in nature and should not require further factual development."). Floren discusses ripeness in the context of challenges to agency action. *See id.* at 1109–11 (citations omitted). Administrative law is, indeed, a common area of law in which ripeness issues arise. *See, e.g.*, Nat'l Park Hospitality Ass'n v. Dep't of Interior, 538 U.S. 803, 807–12 (2003) (citations omitted) (analyzing whether a controversy concerning the validity of a federal management program for national parks was ripe for judicial resolution). Nevertheless, ripeness is also an issue in many other areas of law, such as First Amendment and civil rights claims. *See, e.g.*, Dougherty v. Town of N. Hempstead Bd. of Zoning Appeals, 282 F.3d 83, 90 (2d Cir. 2002) ("[I]n the First Amendment context, the ripeness doctrine is somewhat relaxed."); Herrington v. Cnty. of Sonoma, 857 F.2d 567, 568 (9th Cir. 1988) (discussing whether the plaintiff's civil rights claims concerning land use were ripe for adjudication).

40. Barrick Goldstrike Mines, Inc. v. Browner, 215 F.3d 45, 49 (D.C. Cir. 2000) (holding that the plaintiff's challenge to an EPA regulation requiring the release of information about

Laboratories, the Supreme Court held that the plaintiff's challenge to a federal regulation of the pharmaceutical industry was ripe for review.[41] In that case, the regulation had been promulgated, and the plaintiff's challenge focused on the issue of whether the regulation was permissible under the underlying statute.[42] The Court reasoned that the facts of the case were clear and nothing more was necessary for the Court to be able to determine whether the regulation was permissible under the statute.[43]

On the other hand, cases are unlikely to be fit for review when they present a more complicated or undefined fact pattern that does not have a clearly articulated dispute.[44] For example, in *United Public Workers v. Mitchell*,[45] the Court held that the "ill defined controversies over constitutional issues" prevented the case from being ripe.[46] In that case, the plaintiffs challenged part of the Hatch Act,[47] which prohibited federal employees from participating in certain election activities.[48] The plaintiffs, however, had not demonstrated any clear intent to participate in the prohibited election activities; rather, they had only made general statements about their interest in participating in such activities.[49] Without a more complete factual record, the Court determined that because it could not pass judgment on the validity of the Hatch Act as applied to these plaintiffs, the case was not ripe.[50]

A case may present a sufficiently concrete dispute to satisfy Article III's requirements and, thus, be fit for judicial review, even if the plaintiff has not yet had a law enforced against him, which is known as a preenforcement challenge

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hazardous material needed no more factual development for the court to be able to resolve the issue).

41. *See* Abbott Labs. v. Gardner, 387 U.S. 136, 156 (1967).

42. *See id.* at 138–39 (citing 21 U.S.C. § 371(a) (2006); 21 C.F.R. § 1.104(g)(1) (1966); Drugs Labeling and Advertising, 28 Fed. Reg. 1448 (Feb. 8, 1963) (to be codified at 21 C.F.R. pt. 1)).

43. *See id.* at 149.

44. *See, e.g.*, Renne v. Geary, 501 U.S. 312, 320–23 (1991) (citing Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 306 (1979); O'Shea v. Littleton, 414 U.S. 488, 495 (1974); Int'l Longshoremen's & Warehousemen's Union, Local 37 v. Boyd, 347 U.S. 222, 224 (1954); Rescue Army v. Mun. Ct. of L.A., 331 U.S. 549, 584 (1947)) (holding that a challenge to a California constitutional provision was not ripe because the factual record was "not clear" and the impact of the provision upon the parties was uncertain).

45. 330 U.S. 75 (1947).

46. *See id.* at 90–91. For a more thorough discussion of the facts of this case, see *infra* notes 98–105.

47. 5 U.S.C. §§ 7321–7326 (2006).

48. *See id.*; *United Pub. Workers*, 330 U.S. at 81–82.

49. *Id.* at 87, n.18. The Court cited an affidavit filed by one of the plaintiffs showing the general nature of his intent to engage in election activity, but lacking any specifics. *See id.*

50. *See id.* at 91. One plaintiff, George P. Poole, did present a ripe case. *See id.* Poole had engaged in political activity in the past, and his allegations regarding Hatch Act violations of his constitutional rights were specific enough to convince the Court that a concrete dispute existed. *Id.* at 91–92 (citing Maryland Cas. Co. v. Pacific Coal & Oil Co., 312 U.S. 270, 273 (1941); Atlvater v. Freeman, 319 U.S. 359, 364 (1943); Nashville, C. & St. L. Ry. v. Wallace, 288 U.S. 249, 260 (1932)).

to a law.[51] Despite a case's preenforcement nature, a plaintiff's case is ripe if the plaintiff shows "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and . . . a credible threat of prosecution thereunder."[52]

A famous example of such a case is *Steffel v. Thompson*,[53] in which Steffel had been threatened with arrest—but not actually arrested—for distributing handbills in protest of the Vietnam War.[54] Steffel sued the state, seeking a declaratory judgment that the law under which the state threatened prosecution violated the First Amendment.[55] The Court held that, despite the lack of prosecution, Steffel could challenge the law because he "demonstrate[d] a genuine threat of enforcement."[56]

Despite the "low threshold" for ripeness in preenforcement challenges,[57] some challenges fail to meet the applicable standard. For instance, in *Alaska Right to Life Political Action Committee v. Feldman*,[58] the Ninth Circuit upheld the district court's decision that the case was not ripe for prudential reasons.[59] In that case, a political action group challenged provisions in Alaska's judicial ethics code in its effort to have judicial candidates respond to a questionnaire.[60] Because no judge had answered the questionnaire, the Alaska Commission on Judicial Conduct never undertook any review, and the Alaska Supreme Court gave no indication that it would punish a judge who responded, the case was not ripe—the issues were not fit for review and the plaintiffs could not show a hardship.[61]

The exact line between what constitutes a credible threat of enforcement and what does not is difficult to draw with precision,[62] but this line need not be

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51. *See, e.g.*, Abbott Labs. v. Gardner, 387 U.S. 136, 139 (1967) (providing an example of a preenforcement challenge).

52. Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 298 (1979) (citing Doe v. Bolton, 410 U.S. 179, 188 (1973)).

53. 415 U.S. 452 (1974).

54. *See id.* at 455.

55. *See id.* at 454–55.

56. *Id.* at 475. Although *Steffel* is technically not a case about ripeness, it demonstrates that a controversy exists when a plaintiff faces a credible threat of having a law enforced against him—a requirement of a ripe case. Another famous case that demonstrates this credible threat of enforcement—and that is often more associated with ripeness—is *Babbitt v. United Farm Works National Union*, in which the Supreme Court held that some of the preenforcement challenges to a state law regulating agricultural labor relations were justiciable and some were not, based on the activities in which the plaintiffs had engaged or the activities that entailed a credible threat of enforcement. 442 U.S. at 292, 299.

57. *See* N.H. Right to Life Political Action Comm. v. Gardner, 99 F.3d 8, 15 (1st Cir. 1996).

58. 504 F.3d 840 (9th Cir. 2007).

59. *See id.* at 849.

60. *See id.* at 843.

61. *See id.* at 849–53 (citations omitted).

62. This line has been a matter of debate among legal scholars for decades. *See generally* Comment, *Threat of Enforcement—Prerequisite of a Justiciable Controversy*, 62 COLUM. L. REV.

delineated here. Simply acknowledging the soundness of allowing preenforcement challenges[63] and noting that plaintiffs in preenforcement challenges must meet the burden of showing a credible threat of enforcement is sufficient for the purpose of this Article.

Declaratory judgments are closely related to preenforcement challenges; indeed, these judgments are often the requested relief in preenforcement cases.[64] The authority to issue declaratory judgments "does not create a basis for federal jurisdiction. Rather, jurisdiction must be established in accordance with Article III, Section 2 of the Constitution, and therefore, jurisdiction under the Declaratory Judgment Act requires an actual controversy between the parties."[65]

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106 (1962) (discussing the uncertainty surrounding what constitutes a threat of enforcement to present a justiciable case in federal court in the mid-twentieth century).

Nevertheless, courts have provided some guidance regarding situations that sufficiently demonstrate a credible threat. For example, "when dealing with pre-enforcement challenges to recently enacted . . . statutes that facially restrict expressive activity by the class to which the plaintiff belongs, courts will assume a credible threat of prosecution in the absence of compelling contrary evidence." *N.H. Right to Life Political Action Comm.*, 99 F.3d at 15. Such compelling contrary evidence includes instances when the government has interpreted a law such that the conduct in which the plaintiff desires to engage does not violate the law. *See* Wis. Right to Life, Inc. v. Paradise, 138 F.3d 1183, 1186 (7th Cir. 1998). Another type of compelling contrary evidence arises when the government has explicitly stated that it will not prosecute the plaintiff for its conduct. *See* Graham v. Butterworth, 5 F.3d 496, 499 (11th Cir. 1993). Compelling evidence does not exist, however, when the government has only declined to enforce a statute. *See* Vt. Right to Life Comm., Inc. v. Sorrell, 221 F.3d 375, 382 (2d Cir. 2000) (noting that "nothing . . . prevents the State from changing its mind" in this situation). Nor does compelling evidence exist when the government refuses to assure a plaintiff that the plaintiff would not be prosecuted under an allegedly unconstitutional statute. *See* Am. Civil Liberties Union v. Fla. Bar, 999 F.2d 1486, 1494 (11th Cir. 1993) (holding that a candidate for judicial office had a ripe case because the state bar had not given the candidate a binding statement that the candidate's proposed campaign method would not violate the code of ethics).

63. Professor Kenneth Culp Davis provides a powerful example of the soundness of preenforcement challenges from the Jim Crow era:

> Suppose that a shoe store owned and operated by Negroes is drawing business away from shoe stores owned and operated by white people and that the legislative authority of the southern city enacts an ordinance providing that any white person patronizing a Negro shoe store shall be fined or imprisoned. Suppose that without any official action to carry the ordinance into effect, nearly all whites, fearing possible prosecution, withdraw their patronage from the Negro store. Is the ordinance ripe for challenge by the Negro owners? The only sensible answer is that unless relief is to be denied for serious harm inflicted by the unconstitutional ordinance, the Negro owners must be permitted to challenge the ordinance as soon as a substantial amount of white patronage is withdrawn. If the impact of a statute is to change the behavior of those who deal or may deal with the plaintiff, and if the change causes substantial damage to the plaintiff, then the statute is ripe for challenge by the plaintiff even though no prosecutor has threatened to enforce it and even though an administrative agency which is empowered to carry out the statute has not yet acted.

Davis, *supra* note 20, at 1136–37.

64. *See* 28 U.S.C. § 2201 (2006); *see also* Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 244 (1937) (upholding the constitutionality of declaratory judgments).

65. Priority Healthcare Corp. v. Aetna Specialty Pharmacy, LLC, 590 F. Supp. 2d 663, 667 (D. Del. 2008) (citing 28 U.S.C. § 2201(a); MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118, 127

Thus, when a party seeks a declaratory judgment, that request still "must be presented in the context of a specific live grievance."[66] This requirement prevents courts from issuing advisory opinions.[67]

Preenforcement challenges and actions seeking a declaratory judgment are particularly relevant in the First Amendment ripeness context.[68] First Amendment claims raising ripeness issues often involve challenges to a law that allegedly violates a plaintiff's constitutional rights, in which the plaintiff asks the court to strike down the law before the government enforces it against the plaintiff.[69] Plaintiffs in these cases must show a credible threat that the law will

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(2007); EMC Corp. v. Norand Corp., 89 F.3d 807, 810 (Fed. Cir. 1996), *overruled in part on other grounds*, MedImmune, Inc. v. Gentech, Inc. 549 U.S. 118 (2007)). *But see generally* Donald L. Doernberg & Michael B. Mushlin, *The Trojan Horse: How the Declaratory Judgment Act Created A Cause of Action and Expanded Federal Jurisdiction While the Supreme Court Wasn't Looking*, 36 UCLA L. REV. 529 (1989) (arguing that the Declaratory Judgment Act has actually expanded federal jurisdiction).

66. Golden v. Zwickler, 394 U.S. 103, 110 (1969). *See generally* Note, *Declaratory Judgments in Constitutional Litigation*, 51 HARV. L. REV. 1267 (1938) (discussing the reluctance by the Supreme Court to hear actions seeking declaratory judgments on constitutional questions without a concrete dispute between the parties).

67. *See* United Pub. Workers v. Mitchell, 330 U.S. 75, 89 (1947) ("As is well known, the federal courts establishment pursuant to Article III of the Constitution do not render advisory opinions." (citing Ala. State Fed'n of Labor v. McAdory 325 U.S. 450, 461 (1945); Alabama v. Arizona, 291 U.S. 286, 291 (1934); Hayburn's Case, 2 U.S. (2 Dall.) 408, 413 (1792) ; 3 THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY, 1763–1826, at 486 (Henry P. Johnston ed., 1971))). *See generally* Robert Pushaw, Jr., *Why the Supreme Court Never Gets Any "Dear John" Letters: Advisory Opinions in Historical Perspective*, 87 GEO. L.J. 473, 486–87 (1998) (discussing Chief Justice Jay's refusal to give an advisory opinion to President Washington and the constitutional basis of that decision).

Note that federal courts have even greater discretion in deciding whether to grant declaratory relief than they do when a plaintiff seeks nondeclaratory relief. *See generally* Wilton v. Seven Falls Co., 515 U.S. 277, 284, 286–87 (1995) (discussing the discretionary standard that applies to claims seeking declaratory relief compared to claims for nondeclaratory relief, which federal courts have a "virtually unflagging obligation" to hear (quoting Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976); 28 U.S.C § 2201(a))).

68. *See, e.g.*, Steffel v. Thompson, 415 U.S. 452, 454–55 (1974) (discussing the ripeness of the plaintiff's claim requesting declaratory judgment for a violation of First Amendment rights); Navegar v. United States, 103 F.3d 994, 998 (D.C. Cir. 1997) ("A related component of justiciability which is particularly relevant in the context of actions for preenforcement review of statutes is 'ripeness,' which focuses on the timing of the action rather than on the parties seeking to bring it.").

69. *See, e.g.*, Virginia v. Am. Booksellers Ass'n, 484 U.S. 383, 387–88 (1988) (citing VA. CODE ANN. §§ 18.2-390, 18.2-391 (2009)) (challenging a state law prohibiting the display of sexually explicit material to children); New Mexicans for Bill Richardson v. Gonzales, 64 F.3d 1495, 1497 (10th Cir. 1995) (challenging a state law governing campaign finance).

Whether the statute imposes civil or criminal liability does not matter; what matters is that there is a credible threat that the statute will be enforced against the plaintiff. *See, e.g.*, Abbott Labs. v. Gardner, 387 U.S. 136, 152–53 (1967) (making no distinction between civil or criminal penalties). As the Second Circuit noted, "[T]he fear of civil penalties can be as inhibiting of speech as can trepidation in the fact of threatened criminal prosecution." Vt. Right to Life Comm., Inc. v. Sorrell, 221 F.3d 376, 382 (2d Cir. 2000).

be enforced against them to present a case that is fit for judicial review.[70] Ultimately, the focus of this prong of the ripeness test is to ensure that the court has a sufficiently developed dispute so that the court can accurately decide the case.[71]

2. *Hardship to the Parties of Withholding Review*

The second prong of the ripeness test examines whether the parties will face some hardship if judicial decision is withheld.[72] As the Tenth Circuit explained, this prong "examine[s] whether the challenged action creates a direct and immediate dilemma for the parties."[73]

Similar to the standard used in determining when a case is fit for judicial review, the required showing that hardship to the parties would result from a court withholding review lacks any precise definition.[74] Still, courts have developed some generally applicable principles.[75] For example, mere financial loss is an insufficient hardship to warrant immediate review.[76] Yet when a party would experience financial loss and would have to change its behavior to comply with the challenged law, the resulting hardship is sufficient grounds for immediate review.[77] In *Abbott Laboratories*, the Court noted that, for the company to comply with the challenged regulation, it "must change all their labels, advertisements, and promotional materials; . . . must destroy stocks of printed matter; and . . . must invest heavily in new printing type and new

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70. *See* Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 298 (1979) (citing Doe v. Bolton, 410 U.S. 179, 188 (1973)).

71. *See Abbott Laboratories*, 387 U.S. at 148 ("[I]t is fair to say that its basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements . . . .").

72. *See id.* at 149.

73. Skull Valley Brand of Goshute Indians v. Nielson, 376 F.3d 1223, 1237 (10th Cir. 2004) (quoting *New Mexicans for Bill Richardson*, 64 F.3d at 1499) (internal quotation marks omitted).

Note that the precedent on this issue in standing and ripeness cases can often overlap. *See* Wolfson v. Brammer, 616 F.3d 1045, 1058 (9th Cir. 2010) ("Whether framed as an issue of standing of ripeness, the inquiry is largely the same: whether the issues presented are 'definite and concrete, not hypothetical or abstract.'" (quoting Thomas v. Anchorage Equal Rights Comm'n., 220 F.3d 1134, 1139 (9th Cir. 1999))).

74. *See Thomas*, 220 F.3d at 1142 (citing Winter v. Cal. Med. Review, Inc., 900 F.2d 1322, 1324 (9th Cir. 1990)) (concluding that considerations of ripeness are based on the court's discretion).

75. *See, e.g.*, Dietary Supplemental Coal., Inc. v. Sullivan, 978 F.2d 560, 562 (9th Cir. 1992) ("To meet the hardship requirement, a party must show that withholding judicial review would result in direct and immediate hardship and would entail more than possible financial loss." (quoting *Winter*, 900 F.2d at 1325)).

76. *See id.*

77. *See, e.g.*, *Skull Valley*, 376 F.3d at 1238 (quoting Skull Valley Band of Goshute Indians v. Nielson, 215 F. Supp. 2d 1232, 1243 (D. Utah 2002)) (noting the "substantial costs" of compliance, both monetary and other), *aff'd*, 376 F.3d 1223 (10th Cir. 2004).

supplies."[78] Because compliance would require all of these steps, the company would have faced significant hardship if the case had not been decided at that time.[79] Without the compliance costs that directly affected the company's business, the company would not have faced a hardship making judicial review necessary at that time.[80]

According to the Eleventh Circuit, "Potential litigants [also] suffer substantial hardship if they are forced to choose between foregoing lawful activity and risking substantial legal sanctions."[81] This type of hardship exists "when enforcement of a statute or regulation is inevitable and the sole impediment to ripeness is simply a delay before the proceedings commence."[82] An example of such hardship may be found in *Virginia v. American Booksellers Ass'n, Inc.*,[83] in which the Court held that a law "aimed directly at the plaintiffs" forcing them to choose between "significant and costly compliance measures or . . . criminal prosecution" was a sufficient hardship to create a justiciable case.[84] Of course, whether an adequate hardship exists "depends on the immediacy of the threat and the burden imposed on the petitioner. The threatened harm must be immediate, direct, and significant."[85]

A case will not meet this standard, however, when the alleged injury is merely "speculative."[86] For example, in *Public Water Supply District No. 10 of Cass County, Missouri v. City of Peculiar, Missouri*,[87] the Eighth Circuit held that the water supply district's claim for declaratory relief was not ripe.[88] In that case, the water supply district sought a declaratory judgment that the city was acting illegally under state law in its efforts to dissolve the district.[89] The case was not ripe because at the time the suit was filed, "no petition for dissolution

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78. Abbott Labs. v. Gardner, 387 U.S. 136, 152 (1967).

79. *See id.* at 152–53.

80. *See, e.g.*, Toilet Goods Ass'n v. Gardner, 387 U.S. 158, 164 (1967) (citing 5 U.S.C. § 704 (2006)) (holding that the challenge to a law was not ripe because the compliance costs did not affect "primary conduct," such as "when contracts must be negotiated, ingredients tested or substituted, or special records compiled").

81. Cheffer v. Reno, 55 F.3d 1517, 1524 (11th Cir. 1995); *see also* Presbytery of N.J. of Orthodox Presbyterian Church v. Florio, 40 F.3d 1454, 1468 (3d Cir. 1994) ("[I]t is well established that a case is ripe because of the substantial hardship to denying preenforcement review when a person is forced to choose between forgoing possibly lawful activity and risking substantial sanctions." (quoting ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 2.4, at 103 (1989))).

82. Kardules v. City of Columbus, 95 F.3d 1335, 1344 (6th Cir. 1996).

83. 484 U.S. 383 (1988).

84. *Id.* at 392.

85. Castellon-Gutierrez v. United States, 754 F. Supp. 2d 774, 777 n.7 (D. Md. 2010) (quoting Charter Fed. Sav. Bank v. Office of Thrift Supervision, 976 F.2d 203, 208–09 (4th Cir. 1992); Pearson v. Leavitt, 189 F. App'x 161, 164 (4th Cir. 2006)) (internal quotation marks omitted).

86. *See* Pub. Water Supply Dist. No. 10 of Cass Cnty., Mo. v. City of Peculiar, Mo., 345 F.3d 570, 573 (8th Cir. 2003).

87. 345 F.3d 570.

88. *See id.* at 573.

89. *See id.* at 571.

[had] been filed, and it [was] not clear that a petition [would] ever be filed."[90] For instance, the water supply district offered no evidence that the city had a petition with enough signatures to warrant submission to a state circuit court.[91]

One last note about this prong of the ripeness test must be addressed: the hardship to the parties is closely related to the credible threat of enforcement aspect of the fitness prong, which ensures that the facts of the case are sufficiently well-developed for judicial review.[92] In First Amendment cases, concerns about hardship and a credible threat of enforcement often overlap.[93]

B. The Foundations of Ripeness: Constitutional or Prudential?

Having set forth the test courts apply to determine whether a case is ripe,[94] this Article now considers the basis for that test: Is it an Article III requirement and, thus, a constitutional hurdle for plaintiffs? Or is it a prudential requirement courts use to ensure that they decide only those cases that are sufficiently concrete for accurate judicial resolution? This Article concludes that ripeness has both a constitutional and prudential basis.[95] But the historical treatment of

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90. *Id.* at 573.

91. *See id.*

92. *See id.* at 573 (citing Abbott Labs. v. Gardner, 387 U.S. 136, 148 (1967)) ("Whether a case is 'fit' depends on whether it would benefit from further factual development.").

93. *See, e.g.*, Dermer v. Miami-Dade Cnty., 599 F.3d 1217, 1221 (11th Cir. 2010) ("While '[h]ardship can sometimes be established if a plaintiff demonstrates that he would have to choose between violating an allegedly unconstitutional statute or regulation and risking criminal or severe civil sanctions . . . plaintiffs must still demonstrate a credible threat of prosecution.' . . . This requirement is not satisfied if 'it would strain credulity to say that there is a credible threat that [a plaintiff's] *First Amendment* rights will be violated in the future.'" (quoting Elend v. Basham, 471 F.3d 1199, 1211 (11th Cir. 2006))).

94. This Article considers ripeness as a general doctrine—that is, as it is discussed in HART & WECHSLER, *supra* note 19. This Article does not contemplate other specific ripeness doctrines, such as the ripeness test for takings claims under the Fifth Amendment from *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194–95 (1985). That doctrine is clearly prudential in nature, and it raises concerns that are distinct from those discussed in this Article. For a thoughtful analysis of the *Williamson County* ripeness requirement, consider the analysis of Judge Dennis W. Shedd in *Sansotta v. Town of Nags Head*, 724 F.3d 533, 544–49 (4th Cir. 2013).

95. *See* Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 670 n.2 (2010) ("Ripeness reflects constitutional considerations that implicate Article III limitations on judicial power, as well as prudential reasons for refusing to exercise jurisdiction." (quoting Reno v. Catholic Soc. Servs., Inc., 509 U.S. 43, 57 n.18 (1993))) (internal quotation marks omitted); Nat'l Park Hospitality Ass'n v. Dep't of Interior, 538 U.S. 803, 808 (2003) ("The ripeness doctrine is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction . . . ." (quoting *Reno*, 509 U.S. at 57 n.18)) (internal quotation marks omitted); Gregory M. Stein, *Regulatory Takings and Ripeness in the Federal Courts*, 48 VAND. L. REV. 1, 11–12 (1995) (citing U.S. CONST. art. III, § 2) ("The ripeness doctrine is generally viewed as being both constitutionally required and judicially prudent. The constitutional mandate results from Article III's requirement that federal courts hear only cases or controversies. The prudential restrictions result from the fact that most courts would rather avoid speculative cases, defer to finders of fact with greater subject matter expertise, decide cases with fully-developed records, and

ripeness is far from uniform, and the constitutional underpinnings of ripeness are not universally accepted by legal scholars.[96]

United Public Workers v. Mitchell[97] is considered the starting point of modern ripeness jurisprudence.[98] In that case, a number of federal employees challenged the constitutionality of the Hatch Act's prohibitions on their political activities.[99] In rendering its decision, the Supreme Court displayed an acute awareness of the constitutional limits on its power.[100] Justice Reed, writing for the Court, framed the issue as one of separation of powers.[101] He wrote that "[t]he Constitution allots the nation's judicial power to the federal courts. Unless these courts respect the limits of that unique authority, they intrude upon powers vested in the legislative or executive branches."[102] The Court focused on ensuring more than a "hypothetical threat" of an injury that would force the Court to "speculate" to render a decision.[103] Based on these principles, the Court held that only one petitioner, George Poole, had a ripe case.[104] Poole admitted to violating the Hatch Act in his allegations, whereas the other plaintiffs only offered amorphous allegations that they "wish[ed] to engage" in political activities, which the Court held were insufficient to present a ripe claim.[105]

The Court adopted a constitutional basis for the ripeness doctrine in *Mitchell*.[106] Justice Reed focused intensely on the constitutional requirements of Article III,[107] and by framing the Court's lack of power to hear the case as a separation of powers issue, he undeniably tied this jurisdictional requirement to the Constitution.[108] The constitutional basis for ripeness in *Mitchell* was so clear

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avoid overly broad opinions, even if these courts might constitutionally hear a dispute. The ripeness doctrine, then, focuses both on whether an Article III case or controversy is present and on whether it would be wise for the court to decide a dispute that may be premature.").

96. *See infra* notes 155–65 and accompanying text.

97. 330 U.S. 75 (1947).

98. *See* HART & WECHSLER, *supra* note 19, at 198.

99. *See Mitchell*, 330 US. at 81–82.

100. *See id.* at 90.

101. *See id.* at 78, 90–91.

102. *Id.* at 90.

103. *See id.*

104. *See id.* at 91–94 (citations omitted).

105. *See id.* at 87 n.18; *see also id.* at 90 ("It would not accord with judicial responsibility to adjudge, in a matter involving constitutionality, between the freedom of the individual and the requirements of public order except when definite rights appear upon the one side and definite prejudicial interferences upon the other.").

106. *See id.* at 89–90 (citations omitted) (focusing on the constitutional limits of their judicial authority).

107. *See id.* at 89–91 (citations omitted).

108. *See id.* Of course, the Court in *Mitchell* never used the word *ripe*, or its variations, but the basis of the decision rests on the plaintiffs' failure to take any action that could create a credible threat of enforcement. *See id.* at 90 (concluding that "a hypothetical threat is not enough," when the plaintiffs had not acted under the statute and, therefore, the statute had not been enforced against them). Hart and Wechsler suggest that *Mitchell* was not ripe because the controversy was "too 'ill-defined.'" HART & WECHSLER, *supra* note 19, at 205 (citing *Mitchell*, 330 U.S. at 90–91). That suggestion stresses the same idea as the lack of credible enforcement allegation: both assertions

that one scholar has called ripeness "a wholly constitutional doctrine" in its "earliest stages."[109]

Despite the constitutional focus in *Mitchell*, the Court explicitly adopted a two-part test for ripeness in *Abbott Laboratories* that seemed far more prudential than constitutional; however, it also included the constitutional foundation from *Mitchell*.[110] Consider the test: the first part of the *Abbott Laboratories* test looks to "the fitness of the issues for judicial decision."[111] A constitutional requirement can plausibly be read into this prong.[112] *Judicial review* is a term that conjures notions of constitutional responsibility.[113] Given the constitutional moorings of this term,[114] looking to the "fitness" of a case for judicial review most logically means determining whether the issues presented are sufficient to meet the constitutional requirements for a federal court to exercise jurisdiction under Article III.[115] The *Abbott Laboratories* test thus includes the constitutional basis for ripeness that the Court established in *Mitchell*.[116]

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emphasize the lack of a concrete dispute. *See id.* (analogizing *Mitchell*'s "ill-defined" dispute analysis with ripeness analysis).

109. *See* Jonathan D. Varat, *Variable Justiciability and the* Duke Power *Case*, 58 TEX. L. REV. 273, 298 (1980).

110. For an early analysis of this case, see generally *The Supreme Court, 1966 Term*, 81 HARV. L. REV. 69, 225–31 (1967) (citations omitted).

111. *See* Abbott Labs. v. Gardner, 387 U.S. 136, 149 (1967).

112. *See* Peter H.A. Lehner, Note, *Judicial Review of Administrative Inaction*, 83 COLUM. L. REV. 627, 652 n.165 (citing *Abbott Laboratories*, 387 U.S. at 148–54) (referencing *Abbott Laboratories* when stating that, to the extent the finality requirement involves the ripeness doctrine, it may have a constitutional basis).

113. *See, e.g.*, United States v. Munoz-Flores, 495 U.S. 385, 404 n.3 (1990) (noting that "respect for [the Court's] power of judicial review is a constitutional necessity in the ordinary case"); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."); Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 425 n.150 (1996) (noting the constitutional basis of judicial review, including how many Justices involved in the Constitution's ratification viewed judicial review as rooted in the Constitution).

114. *See Marbury*, 5 U.S. (1 Cranch) at 177 (1803). Of course, although *Marbury* is often viewed as establishing judicial review as a matter of constitutional law, many scholars view *Marbury* as far more complex. *Compare* Orrin G. Hatch, *Modern* Marbury *Myths*, 57 U. CIN. L. REV. 891, 892 (1989) ("The doctrine of judicial review articulated by *Marbury v. Madison* is indeed the foundation of much constitutional law."), *with* Richard H. Fallon, Jr., Marbury *and the Constitutional Mind: A Bicentennial Essay on the Wages of Doctrinal Tension*, 91 CALIF. L. REV. 1, 4–8 (2003) (citing RITA L. ATKINSON ET AL., INTRODUCTION TO PSYCHOLOGY 735 (11th ed. 1993); PETER GRAY, PSYCHOLOGY 520 (4th ed. 2002)) (arguing that *Marbury* establishes more than just judicial review).

115. *See, e.g.*, North v. Walsh, 656 F. Supp. 414, 418 (D.D.C. 1987) (commenting that the court must first determine whether the claim is a justiciable case or controversy such that the court has jurisdiction).

116. *See, e.g.*, *id.* at 419 ("First, as a matter of constitutional importance, the Court must evaluate 'the fitness of the issue for judicial review.'" (quoting *Abbott Laboratories*, 387 U.S. at 149)).

Still, some courts consider this prong a prudential requirement because the fitness assessment does not entail an examination of whether the issues meet constitutional requirements; rather, it entails an examination of whether the issues are appropriate for review at that time, given all of the

But *Abbott Laboratories* went further.[117] The second prong—whether the parties would face a "hardship" if the case were not decided[118]—embraced a prudential element that the Court had not fathomed in *Mitchell*.[119] Although requiring a party to face a certain level of hardship before it can file a justiciable case in federal court might theoretically be a constitutional requirement, the hardship requirement is more reasonably characterized as a prudential one.[120] This aspect of the ripeness test "aims to improve the decisionmaking process and to avoid the unnecessary expenditure of judicial resources."[121] The prudential requirement also gives a court more flexibility to avoid hearing cases for any reason it sees fit, regardless of whether that reason is based in the Constitution.[122]

The view of the hardship requirement as a prudential one is confirmed by the Court's decision in *Abbott Laboratories*.[123] In that case, the Court focused on

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facts. *See, e.g.*, Thomas v. Anchorage Equal Rights Comm'n, 220 F.3d 1134, 1141 (9th Cir. 1999) (citing *Abbott Laboratories*, 387 U.S. at 149) (adopting the view that the first prong of the *Abbott Laboratories* test is prudential in nature). Even when courts take this view, they still note that ripeness has a constitutional basis. *See, e.g.*, *id.* at 1138 (discussing the "constitutional component" of ripeness). Courts that take this view treat the constitutional basis of ripeness as synonymous with the standing test because ripeness and standing are interrelated. *See id.* at 1138–39 (citing Erwin Chemerinsky, *A Unified Approach to Justiciability,* 22 CONN. L. REV. 677, 681–82 (1990)). Thus, despite treating the *Abbott Laboratories* test solely as a prudential standard, these courts recognize that ripeness has a constitutional basis in addition to a prudential one. *See id.* Furthermore, given how standing jurisprudence has shaped the ripeness doctrine, the analysis is ultimately rather similar. *See infra* note 268. Finally, some courts treat both prongs of the *Abbott Laboratories* test as relevant to both constitutional and prudential ripeness. *See, e.g.*, Simmonds v. Immigration & Naturalization Serv., 326 F.3d 351, 359 (2d Cir. 2003) (observing that the *Abbott Laboratories* test is relevant for both constitutional and prudential ripeness).

117. *Abbott Laboratories*, 387 U.S. at 149.

118. *See id.*

119. *Compare* United Pub. Workers of Am. v. Mitchell, 330 U.S. 75, 89 (1947), *with Abbott Laboratories*, 387 U.S. at 148, 152 (comparing the discussion of ripeness in terms of advisory opinions with a discussion of hardship as a constitutional requirement).

120. *See* Hessick, *supra* note 19, at 79–80; *see also* David S. Mendel, Note, *Determining Ripeness of Substantive Due Process Claims Brought by Landowners Against Local Governments*, 95 MICH. L. REV. 492, 501 (1996) ("Courts may not consider the institutional benefits of postponing judicial review in isolation from the actual harm that may be suffered by the complainant.").

121. *See* Hessick, *supra* note 19, at 80.

122. *Cf.* Mendel, *supra* note 120, at 500 ("These concerns are 'prudential,' because they are not required by the Constitution; rather, courts invoke them at their own discretion.").

Ripeness is, thus, similar to standing in that the plaintiff's case could theoretically meet the constitutional requirements for ripeness, yet the case could still be dismissed on prudential grounds. *See, e.g.*, Gladstone Realtors v. Vill. of Bellwood, 441 U.S. 91, 99–100 (1979) ("Even when a case falls within these constitutional boundaries, a plaintiff may still lack standing under the prudential principles by which the judiciary seeks to avoid deciding questions of broad social import where no individual rights would be vindicated and to limit access to the federal courts to those litigants best suited to assert a particular claim.").

123. *See* Mendel, *supra* note 120, at 501 (citing *Abbott Laboratories*, 387 U.S. at 149) (noting that *Abbott Laboratories* stands for the proposition that courts must balance prudential concerns with the hardship to the parties of not deciding the case).

the hardship that the petitioner would face if the case was not decided.[124] For instance, the Court noted that the petitioner would have to "change all [its] labels, advertisements, and promotional materials; . . . destroy stocks of printed matter; and . . . invest heavily in new printing type and new supplies."[125]

Toilet Goods Association, Inc. v. Gardner,[126] a case decided on the same day as *Abbott Laboratories*, provides further support for this interpretation of the hardship requirement. In *Toilet Goods*, the Court noted that the agency action was final and the issue presented was a purely legal question.[127] Nevertheless, the Court stated that "[t]hese points which support the appropriateness of judicial resolution are . . . outweighed by other considerations."[128] Those other considerations were prudential, concerning the burden—or lack thereof—that the petitioner would face if the case was not decided.[129] For example, rather than facing criminal penalties, the petitioner merely faced the prospect of "suspension of certification services."[130] Taken together, *Abbott Laboratories* and *Toilet Goods* indicate that the Court considers the hardship requirement to be a prudential element in the ripeness test.[131]

This injection of prudentialism is consistent with the increased focus on prudential factors in judicial decisionmaking during the 1960s and 1970s.[132] For example, in addition to ripeness, the Warren Court focused on prudential factors in developing standing doctrine,[133] criminal procedure doctrines,[134] and the

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124. 387 U.S. at 152–53.

125. *Id.* at 152.

126. Toilet Goods Ass'n v. Gardner, 387 U.S. 158, 164 (1967).

127. *See id.* at 162–63 (quoting 5 U.S.C. § 704 (2006)) (citing Frozen Foods Express v. United States, 351 U.S. 40, 44–45 (1956); United States v. Storer Broad. Co., 351 U.S. 192, 205 (1956); Columbia Broad. Sys., Inc. v. United States, 316 U.S. 407, 423–24 (1942)).

128. *Id.* at 163.

129. *See id.* at 163–65 (citing 5 U.S.C. § 704; *Gardner*, 387 U.S. at 171–73; *Storer*, 351 U.S. at 205; *Columbia Broad. Sys.*, 316 U.S. at 423–24)).

130. *Id.* at 165. For a classic example of prudential considerations, see Justice Frankfurter's dissent in *Adler v. Bd. of Educ.*, 342 U.S. 485, 497, 504 (1952), *overruled in part by Keyishian v. Bd. of Regents of the State Univ. of N.Y.*, 385 U.S. 589, 595 (1967), in which he argued that the case was not ripe because the facts were not sufficiently developed so as to present a clear indication of the hardship faced by the plaintiff.

131. *See supra* notes 117–24 and accompanying text.

132. *See, e.g.*, Myriam E. Gilles, *Representational Standing:* U.S. ex rel. Stevens *and the Future of Public Law Litigation*, 89 CALIF. L. REV. 315, 318–19 (2001) (describing the Court's shift in the 1970s from "flexible normative standards to hard and fast rules" in the context of standing); Gene R. Nichol, Jr., *Ripeness and the Constitution*, 54 U. CHI. L. Rev. 153, 153–54 (1987) ("For decades prior to the 1970s, principles of justiciability—standing, mootness, ripeness, political questions, and the like—inhabited a hazy middle ground between prudential concern and constitutional mandate.").

133. *See generally* Gilles, *supra* note 132, at 318 ("[P]rior to the 1970s, the Court resisted the view that the standing requirement implicated separation of powers concerns. Instead, the Court analyzed standing on a case-by-case basis, applying flexible and decidedly sub-constitutional standards.").

political question doctrine.[135] This prudentialism remained part of the Burger Court's jurisprudence during the 1970s as well. For example, in the 1978 case of *Duke Power Co. v. Carolina Environmental Study Group, Inc.*,[136] the Court made a cursory observation that ripeness involves a "constitutional" aspect and, subsequently, focused more on the prudential aspects of the doctrine, writing that "[t]he prudential considerations embodied in the ripeness doctrine also argue strongly for a prompt resolution of the claims presented."[137] This case demonstrated the Court's explicit shift in recognizing that ripeness is not solely a constitutional doctrine.[138]

Despite this focus on prudentialism, the Court returned to emphasizing the constitutional basis of ripeness in *Babbitt v. United Farm Works National Union*.[139] In that case, the plaintiffs brought a preenforcement challenge to Arizona's farm labor statute.[140] In holding that the case was not ripe as to two of the five challenged provisions,[141] the Court explicitly framed the justiciability question as a "threshold" matter based on "Art. III of the Constitution."[142] In fact, the Court focused so heavily on the constitutional basis of ripeness that it never even mentioned *Abbott Laboratories* or the two-pronged test from that case.[143] Instead, the Court focused on "whether the conflicting contentions of the parties . . . present[ed] a real, substantial controversy between parties having adverse legal interests, a dispute definite and concrete, not hypothetical or abstract."[144] In holding that challenges to two of the statute's provisions were not ripe, the Court noted that it could "only hypothesize" whether the employers

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134. *See, e.g.*, Berghuis v. Thompkins, 130 S. Ct. 2250, 2273 (2010) (Sotomayor, J., dissenting) (quoting Withrow v. Williams, 507 U.S. 680, 692 (1993); Miranda v. Arizona, 384 U.S. 486, 444–45 (1966)) (calling the rules from *Miranda* "prophylactic").

135. *See, e.g.*, Rachel E. Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 263–73 (2002) (citations omitted) (describing the Warren Court's use of prudential considerations to limit the political question doctrine); Michael J. Gerhardt, Essay, *Super Precedent*, 90 MINN. L REV. 1204, 1212 (2006) (citing Baker v. Carr, 369 U.S. 186, 210–11 (1962)) (noting that the Court focused on "prudential criteria" for the political question doctrine in *Baker v. Carr*).

136. 438 U.S. 59 (1978).

137. *Id.* at 80–81.

138. *See id.*

139. 442 U.S. 289 (1979). Although the Court never actually used any form of the word *ripeness* in *Babbitt*, the case is widely considered to be part of the Court's ripeness jurisprudence. *See, e.g.*, HART & WECHSLER, *supra* note 19, at 210 (citing *Babbitt* in a discussion of whether ripeness is constitutional or prudential for the proposition that the ripeness doctrine is frequently associated with Article III's case and controversy requirement).

140. *See Babbitt*, 442 U.S. at 292.

141. *See id.*

142. *See id.* at 297.

143. *See id.* at 289.

144. *Id.* at 298 (quoting Ry. Mail Ass'n. v. Corsi, 326 U.S. 88, 93 (1945)) (internal quotation marks omitted). Although this language is not identical to the first prong of the *Abbott Laboratories* test, it examines similar aspects of a case, lending further support to the argument that the first prong of the test is more constitutional than prudential. *See supra* notes 110–16 and accompanying text.

would undertake the allegedly unconstitutional act of forcing employees to furnish information about the labor organization or whether the employers would force the employees to arbitrate disputes, making any opinion "patently advisory."[145]

In the decades since the Court reaffirmed the constitutional basis of ripeness in *Babbitt*, the Court has still clung to the *Abbott Laboratories* framework for ripeness analysis, despite its failure to employ that framework in *Babbitt* itself. In *Reno v. Catholic Social Services, Inc.*,[146] for instance, the Court used the two-pronged test to decide that the plaintiff's challenge to a regulation promulgated by the Immigration and Naturalization Service was not ripe.[147] In that case, the Court emphasized the prudential aspect of the test.[148] But even while emphasizing the prudential aspect of ripeness in some cases, the Court has not strayed from its position that ripeness is firmly grounded in the Constitution.[149] For example, while focusing its analysis on the hardship prong in *National Park Hospitality Association v. Department of the Interior*,[150] the Court unambiguously noted that ripeness is a constitutional requirement.[151] Thus, the Supreme Court has established that ripeness has a dual foundation: the Constitution and prudentialism.[152]

This dual foundation for ripeness is widely recognized by courts[153] and scholars.[154] The First Circuit has described ripeness as a doctrine that "mixes

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145. *Id.* at 304.

146. 509 U.S. 43 (1993).

147. *See id.* at 57–59 (citations omitted).

148. *Id.* at 57 n.18 (citing Reg'l Rail Reorganization Act Cases, 419 U.S. 102, 138 (1974)); *see also* Ohio Forestry Ass'n, Inc. v. Sierra Club, 523 U.S. 726, 732–37 (1998) (citations omitted) (focusing on the hardship prong—that is, the prudential aspect—of the ripeness test in holding that the case was not ripe).

149. *See, e.g.*, Nat'l Park Hospitality Ass'n v. Dep't of Interior, 538 U.S. 803, 808 (2003) (quoting *Reno*, 509 U.S. at 57 n.18).

150. 538 U.S. 803.

151. *See id.* at 808 ("The ripeness doctrine is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction." (quoting *Reno*, 509 U.S. at 57 n.18)) (internal quotation marks omitted).

152. The Court has recognized that these foundations are in fact distinct justifications for ripeness and provide separate hurdles that plaintiffs must overcome to have their cases heard in federal court. *See* Buckley v. Valeo, 424 U.S. 1, 114 (1976) (per curiam) ("We have recently recognized the distinction between jurisdictional limitations imposed by Art. III and '[p]roblems of prematurity and abstractness' that may prevent adjudication in all but the exceptional case." (quoting Socialist Labor Party v. Gilligan, 406 U.S. 583, 588 (1972))).

153. *See, e.g.*, *In re* Coleman, 560 F.3d 1000, 1004 (9th Cir. 2009) ("Ripeness has two components: constitutional ripeness and prudential ripeness." (citing Thomas v. Anchorage Equal Rights Comm'n, 220 F.3d 1134, 1138 (9th Cir. 2000) (en banc))); Wyo. Outdoor Council v. U.S. Forest Serv., 165 F.3d 43, 48 (D.C. Cir. 1999) ("[A]n Article III court cannot entertain the claims of a litigant unless they are 'constitutionally and prudentially ripe.'" (quoting La. Envtl. Action Network v. Browner, 87 F.3d 1379, 1381 (1996))).

154. *See, e.g.*, Robert Pushaw, Jr., *Article III's Case/Controversy Distinction and the Dual Functions of Federal Courts*, 69 NOTRE DAME L. REV. 447, 455–56 (1994) (discussing the basis of ripeness); Joan Steinman, *Shining A Light in A Dim Corner: Standing to Appeal and the Right to*

various mutually reinforcing constitutional and prudential considerations."[155] Some scholars, however, have expressed concern about the dueling considerations underlying the doctrine.[156] Professor Gene Nichol describes the constitutionalization of ripeness as "troubling."[157] He argues that this constitutionalization is "[n]ot only . . . inconsistent with the doctrine's premises, but it implies a rigidity and formalism that are at odds with the doctrine's operation. It threatens further to complicate and confuse the case or controversy requirement as well."[158] According to Professor Nichol, ripeness ultimately has "little in common with Article III jurisprudence."[159] Professor Robert Pushaw takes a similarly dim view of the constitutionalization of ripeness.[160] Professor Pushaw contends that *cases* and *controversies* are not synonymous.[161] *Cases* deal with federal question matters, including claims arising under the Constitution, such as First Amendment claims.[162] Professor Pushaw argues that when deciding *cases* rather than *controversies*, judges should have broader authority to declare the law.[163] He claims that ripeness should not be an Article

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Defend A Judgment in the Federal Courts, 38 GA. L. REV. 813, 859 (2004) (noting that ripeness has constitutional and prudential considerations); Nichol, *supra* note 132, at 161–163 (citing Babbitt v. Farm Workers, 442 U.S. 289, 297 (1979); Ellis v. Dyson, 421 U.S. 426, 433 (1975); Steffel v. Thompson, 415 U.S. 452, 458 (1974); Abbott Labs. v. Gardner, 387 U.S. 136, 148–49 (1967); 4 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 25:6, at 370 (1983)) (noting the constitutional and prudential foundations of ripeness); Stein, *supra* note 95, at 6 ("Ripeness is a jurisdictional matter arising under Article III of the United States Constitution that also raises substantial questions of judicial prudence, forcing a federal court to decide whether it can and should hear each case."); *see also* 36 C.J.S. *Federal Courts* § 90 (2012) (stating that the ripeness doctrine has "roots in both the Article III case or controversy requirement and in prudential considerations" (quoting Mangual v. Rotger-Sabat, 317 F.3d 45, 59 (1st Cir. 2003))) (internal quotation marks omitted); WRIGHT, MILLER & COOPER *supra* note 12, § 3532.1, at 375, 378–79 (noting both the constitutional and prudential basis of ripeness).

155. Doe v. Bush, 323 F.3d 133, 138 (1st Cir. 2003).

156. *See* Taylor Inv., Ltd. v. Upper Darby Twp., 983 F.2d 1285, 1289–90 (3d Cir. 1993) ("We recognize '[t]here is some disagreement among courts and commentators as to whether the ripeness doctrine is grounded in the case or controversy requirement or is better characterized as a prudential limitation on federal jurisdiction.'" (quoting Armstrong World Indus. v. Adams, 961 F.2d 405, 411 n.12 (3d Cir.1992))). The Third Circuit noted that courts have disagreed over the foundation of ripeness—its basis for this statement was the Supreme Court's apparent flip-flop between focusing on ripeness as constitutional or prudential. Although the Court's focus has shifted in various cases, its underlying perspective that ripeness is both prudential and constitutional has remained constant for several decades. *See supra* notes 146–153 and accompanying text. Therefore, the real disagreement about the propriety of the dual basis of ripeness is among scholars, not courts.

157. Nichol, *supra* note 132, at 163 (citing *Babbitt*, 442 U.S. at 297).

158. *Id.* at 156.

159. *Id.*

160. *See generally* Pushaw, *supra* note 154, at 529 (discussing Professor Nichol's argument that the cases or controversy requirement cannot be applied to ripeness).

161. *See id.* at 448–49.

162. *See id.* at 449.

163. *See id.* at 472–76, 496–97 (quoting Osborn v. Bank of U.S., 22 U.S. (9 Wheat.) 738, 819 (1824); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803); 2 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION 103, 430 (1911)).

III requirement for constitutional cases because ripeness "demands a prudential evaluation of the substantive legal claim."[164]

Ultimately, scholars' discomfort with the constitutionalization of ripeness seems to be rooted in their belief that ripeness "turns on one's conception not of [A]rticle III, but of the substantive interests asserted."[165] Professor Akhil Reed Amar illustrates this point with a First Amendment example:

> A [F]irst [A]mendment absolutist like Hugo Black and a balancer like Felix Frankfurter will predictably disagree about whether a given anticipatory challenge to a law allowing prior restraint in certain specified circumstances is ripe because the absolutist deems various facts that have not yet materialized irrelevant—prior restraint is always impermissible—whereas a balancer might find those facts dispositive. But this is a disagreement about the meaning of the [F]irst [A]mendment, and not about [A]rticle III.[166]

This concern demonstrates that ripeness "involves difficult questions of judgment and degree."[167] In the minds of these scholars, the minute degrees that govern ripeness analysis are not matters related to Article III, but rather are merely prudential considerations.[168]

Nevertheless, the Court has embraced a constitutional basis for ripeness, a position from which the Court has given no indication that it will waiver.[169] For the foreseeable future, therefore, plaintiffs must satisfy both constitutional and prudential requirements for federal courts to consider their claims.[170] Similarly, scholars must analyze ripeness within this dual-foundational framework.[171]

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164. *Id.* at 529.

165. Akhil Reed Amar, *Law Story*, 102 HARV. L. REV. 688, 718 n.155 (1989) (book review); *see also* Pushaw, *supra* note 154, at 529 (discussing the discretionary aspect of the ripeness doctrine before its "constitutionalization").

166. Amar, *supra* note 165, at 718 n.155.

167. C. Douglas Floyd, *The Justiciability Decisions of the Burger Court*, 60 NOTRE DAME L. REV. 862, 935 (1985); *see also* NE Hub Partners, L.P. v. CNG Transmission Corp., 239 F.3d 333, 341 (3d Cir. 2001) ("Ripeness is a matter of degree whose threshold is notoriously hard to pinpoint.").

168. *See, e.g.*, Mendel, *supra* note 120, at 500 ("These concerns are 'prudential,' because they are not required by the Constitution; rather, courts invoke them at their own discretion."). This Article makes no judgment on the wisdom of ripeness's constitutional basis. I simply highlighted this academic objection to provide a more robust discussion of the basis of ripeness and will address this question at another time.

169. *See supra* note 139.

170. *See, e.g.*, Reno v. Catholic Soc. Servs., Inc., 509 U.S. 43, 57 n.18 (1993) (citing Reg'l Rail Reorganization Act Cases, 419 U.S. 102, 138 (1974)) (explaining that even if the parties do not raise the prudential consideration, a court can raise it on its own).

171. *Cf.* Levy, *Judicial Attention as a Scarce Resource*, *supra* note 3, at 404–05 (arguing that considerations about how the courts of appeals should allocate resources must be made within the existing resource constraints because those constraints are unlikely to change in the near future).

Thus, the discussion of ripeness and First Amendment claims must be undertaken in the context of ripeness's prudential and constitutional bases.[172]

III. THE PREVAILING VIEW OF RIPENESS AND FIRST AMENDMENT CLAIMS

Having set forth the basic test for ripeness and its foundation in Part II, this Part turns to ripeness in the context of First Amendment claims. It examines the most common types of First Amendment challenges in Part III.A before focusing on what courts and scholars have said about the ripeness of these challenges in Part III.B.

A. Types of First Amendment Claims

A law may be challenged on First Amendment grounds under various theories, such as overbreadth, vagueness, prior restraint,[173] and as-applied.[174] The first three types of claims are generally made as facial challenges, meaning they allege that the law will often be unconstitutional when applied.[175] Proving that a law is facially unconstitutional is a high hurdle to overcome,[176] and such challenges are generally disfavored[177]—although that disfavor is not quite as strong in the First Amendment context.[178] The last type of claim, an as-applied challenge, alleges that the law is only unconstitutional as applied in a specific context.[179] A fifth type of First Amendment claim that cannot be characterized as a facial challenge or an as-applied challenge is a claim that a law

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172. *See supra* Part II.B.

173. *See* CHEMERINSKY, *supra* note 7, at 1247, 1254 (quoting Neb. Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976); N.Y. Times v. United States, 403 U.S. 713, 714 (1971) (per curiam)).

174. Richard H. Fallon, Jr., Commentary, *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321, 1321 (2000).

175. A plaintiff can, however, bring an as-applied challenge on both vagueness and prior restraint grounds. *See, e.g.*, Covenant Media of S.C., LLC v. City of N. Charleston, 493 F.3d 421, 437 (4th Cir. 2007) (rejecting an as-applied prior restraint challenge); Farrell v. Burke, 449 F.3d 470, 486 (2d Cir. 2006) (analyzing an as-applied vagueness challenge under a two-part test of (1) whether the law gave a reasonable person notice of what conduct was prohibited and (2) whether the law provides explicit standards for its application (quoting United States v. Nadi, 996 F.2d 548, 550 (2d Cir. 1993))). Despite this exception, these three types of challenges are best thought of as facial challenges because that is the context in which they are most common. *See* CHEMERINSKY, *supra* note 7, at 1247 ("Laws . . . can be challenged as facially unconstitutional on the grounds that they are unduly vague and overbroad.").

176. *See, e.g.*, United States v. Salerno, 481 U.S. 739, 745 (1987) ("A facial challenge . . . is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid.").

177. Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 450 (2008) (stating that "[f]acial challenges are disfavored").

178. *See* S. Or. Barter Fair v. Jackson Cnty., Or., 372 F.3d 1128, 1134 (9th Cir. 2004) ("Courts generally disfavor facial challenges to legislation, although this reluctance is somewhat relaxed in the First Amendment context.").

179. *See* Fallon, *supra* note 174, at 1321.

discriminates against a particular type of speech.[180] Although the type of First Amendment claim depends on the particular law at issue and the particular facts of each case, a basic understanding of the framework involved in each type of claim is useful for fully grasping the concept of ripeness in First Amendment cases.[181]

A plaintiff brings an overbreadth[182] challenge when the plaintiff alleges that a law "regulates substantially more speech than the Constitution allows to be regulated and a person to whom the law constitutionally can be applied can argue that it would be unconstitutional as applied to others."[183] The doctrine of overbreadth is grounded largely on the idea that allowing such challenges will protect speech from any chilling effect created by the allegedly overbroad law.[184] An overbreadth claim is necessarily a facial challenge to a law because if the claim succeeds, the court will hold that the law must be struck down.[185] An overbroad law may be struck down based on its application to a hypothetical third party; a plaintiff need not show that the law has actually been applied in that context.[186] As the Eighth Circuit succinctly articulated this point, "[T]o prevail, a plaintiff must show the challenged law either could never be applied in a valid manner or it is written so broadly that [it] may inhibit the constitutionally protected speech of third parties."[187] Because a successful overbreadth challenge

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180. *See generally* CHEMERINSKY, *supra* note 7, at 1214 (quoting R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992)) ("The Court stated: '[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter or its content.'" (quoting Police Dep't of Chi. v. Mosley, 408 U.S. 92, 95–96 (1972))).

181. Although one cannot draw perfectly neat lines between facial and as-applied challenges, the general framework is still useful for considering how First Amendment claims can be styled. *See generally* Fallon, *supra* note 174 (discussing the lack of clarity regarding the way in which First Amendment cases are brought).

182. The doctrine was conceived in its current vernacular by Professor Lewis Sargentich. *See* Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, 846 (1970) [hereinafter Sargentich Note]; *see also* Katharine Malone, Note, *Parody or Identity Theft: The High-Wire Act of Digital Doppelgangers in California*, 34 HASTINGS COMM. & ENT. L.J. 275, 280 n.23 (2012) (observing that Lewis Sargentich named the overbreadth doctrine in his famous note).

183. CHEMERINSKY, *supra* note 7, at 1249.

184. *See* Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973) (reasoning that overbreadth challenges are permissible because a "statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression"); *see also* New York v. Ferber, 458 U.S. 747, 767–69 (1982) (citations omitted) (discussing the overbreadth doctrine); Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853, 854–57 (1991) (citing Massachusetts v. Oakes, 491 U.S. 576 (1989)) (describing the rationale of the overbreadth doctrine).

185. *See, e.g.*, Farrell v. Burke, 449 F.3d 470, 498 (2d Cir. 2006) ("All overbreadth challenges are facial challenges, because an overbreadth challenge by its nature assumes that the measure is constitutional as applied to the party before the court.").

186. *See* Connection Distrib. Co. v. Holder, 557 F.3d 321, 335–36 (6th Cir. 2009) (quoting *Broadrick*, 413 U.S. at 612–13; United States v. Williams, 553 U.S. 285, 292–93 (2008)) (discussing the overbreadth doctrine).

187. Phelps-Roper v. Nixon, 545 F.3d 685, 692 (8th Cir. 2008) (quoting City Council of L.A. v. Taxpayers for Vincent, 466 U.S. 789, 798 (1984)) (internal quotation marks omitted), *overruled by* Phelps-Roper v. City of Manchester, Mo., 697 F.3d 678, 692 (8th Cir. 2012).

results in a law being struck down entirely,[188] the Supreme Court has called it a "strong medicine,"[189] and, if possible, courts generally take care to adopt a "limiting construction" to avoid striking down the entire law.[190]

A vagueness claim is also a facial challenge to a law.[191] Prohibiting vague laws ensures that the government does not "inhibit the exercise of [First Amendment] freedoms" by leaving citizens unsure of whether the exercise of those freedoms is lawful.[192] The doctrine also protects against "arbitrary and discriminatory enforcement" of the law.[193] If a law leaves people "of common intelligence . . . guess[ing] at its meaning," the law is unconstitutionally vague.[194] Although courts consider vagueness and overbreadth separate bases for challenging a law,[195] some scholars, such as Professor Richard Fallon, argue that vagueness is "best conceptualized as a subpart of First Amendment overbreadth doctrine."[196] Even if vagueness should be merely a subset of the overbreadth doctrine, courts have developed a sufficiently detailed vagueness jurisprudence that allows plaintiffs to style their challenges to a law under either vagueness or overbreadth.[197]

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188. *See, e.g.*, United States v. Stevens, 559 U.S. 460, 464, 482 (2010) (striking down a statute forbidding the commercial creation, sale, or possession of depictions of animal cruelty as overbroad).

189. *Broadrick*, 413 U.S. at 613.

190. *See* Giovani Carandola, Inc. v. Bason, 303 F.3d 507, 512 (4th Cir. 2002) (quoting *Broadrick*, 413 U.S. at 613, 615). Concededly, this discussion of overbreadth challenges is incredibly cursory. For a more detailed discussion of the overbreadth doctrine, see HART & WECHSLER, *supra* note 19, at 168–74 (citations omitted). And for an even more in-depth discussion of the nuances and uncertainties in the doctrine, see generally Fallon, *supra* note 184, at 854–57 (citing Massachusetts v. Oakes, 491 U.S. 576 (1989)) (describing the rationale of the overbreadth doctrine).

191. *See, e.g.*, Farrell v. Burke, 449 F.3d 470, 485, 495–96 (2d Cir. 2006) (noting that a vagueness challenge is a facial attack on a law).

192. Grayned v. City of Rockford, 408 U.S. 104, 109 (1972) (quoting Cramp v. Bd. of Pub. Inst. of Orange Cnty., 368 U.S. 278, 287 (1961); Baggett v. Bullitt, 377 U.S. 360, 372 (1964)). Vague laws also implicate due process concerns because vague laws prevent a person from "steer[ing] between lawful and unlawful conduct." *See id.* at 108.

193. City of Chi. v. Morales, 527 U.S. 41, 56 (1999) (Stevens, J., plurality).

194. Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926) (citing Collins v. Kentucky, 234 U.S. 634, 638 (1914); Int'l Harvester Co. v. Kentucky, 234 U.S. 216, 221 (1914)).

195. *See, e.g.*, *Farrell*, 449 F.3d at 498–99 ("Overbreadth and vagueness are different doctrines. A clear and precise enactment may nevertheless be 'overbroad' if in its reach it prohibits constitutionally protected conduct." (quoting *Grayned*, 408 U.S. at 114)) (internal quotation marks omitted).

196. Fallon, *supra* note 184, at 904; *see also* Floyd, *supra* note 167, at 902–03 (quoting Coates v. City of Cincinnati, 402 U.S. 611, 614 (1971)) (citing *id.* at 617 (Black, J., dissenting in part); *id.* at 618 (White, J., dissenting)) (discussing vagueness challenges in the section on overbreadth challenges); Sargentich Note, *supra* note 182, at 873 (observing that "the doctrines of vagueness and overbreadth are not entirely distinct" and that "[t]he vagueness doctrine . . . has been almost wholly merged with the overbreadth doctrine when statutes covering [F]irst [A]mendment activities are at issue").

197. *See, e.g.*, *Farrell*, 449 F.3d at 484–85, 498–99 (citations omitted) (recognizing that vagueness and overbreadth challenges are different claims despite having similar analyses).

The third type of facial challenge is a claim that a law imposes a prior restraint on speech.[198] A law acts as a prior restraint if it is "[a] governmental restriction on speech or publication before its actual expression."[199] The Supreme Court has held that "prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights."[200] Prior restraints thus "require an unusually heavy justification under the First Amendment."[201] Just as laws that are overbroad or vague violate the First Amendment, laws that operate as prior restraints will almost always fail to pass constitutional muster.[202]

Unlike the three types of facial challenges, an as-applied challenge does not ask a court to strike down an entire law; rather, it asks a court to declare that the law is unconstitutional as applied to a particular case.[203] Thus, if the plaintiff prevails, the law is still valid, but it cannot be applied in that case.[204] This category of First Amendment challenge is often considered a residual category, encompassing all those claims that do not seek the total invalidation of a law.[205]

The last type of First Amendment claim involves a claim that a law discriminates against a particular type of speech.[206] Depending on the type of forum,[207] a law cannot discriminate based on content[208] or viewpoint.[209] This

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198. *See, e.g.*, Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 335 (2010) (treating a challenge to an election law as a prior restraint on speech as a facial challenge).

199. BLACK'S LAW DICTIONARY 1314 (9th ed. 2009).

200. Neb. Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976).

201. N.Y. Times Co. v. United States, 403 U.S. 713, 733 (1971) (White, J., concurring).

202. *See id.* at 717 ("Both the history and language of the First Amendment support the view that the press must be left free to publish news, whatever the source, without censorship, injunctions, or prior restraints."). For several thoughtful treatments of this doctrine that include discussions of its foundations and challenges to the manner in which it is often applied, see generally Stephen R. Barnett, *The Puzzle of Prior Restraint*, 29 STAN. L. REV. 539 (1977) (challenging how the doctrine is applied); Thomas I. Emerson, *The Doctrine of Prior Restraint*, 20 LAW & CONTEMP. PROBS. 648 (1955) (addressing the foundations of prior restraints); John Calvin Jeffries, Jr., *Rethinking Prior Restraint*, 92 YALE L.J. 409 (1983) (examining the role and addressing the application of the doctrine).

203. *See, e.g.*, Foti v. City of Menlo Park, 146 F.3d 629, 635 (9th Cir. 1998) ("An as-applied challenge contends that the law is unconstitutional as applied to the litigant's particular speech activity, even though the law may be capable of valid application to others . . . . A successful as-applied challenge does not render the law itself invalid but only the particular application of the law.").

204. *See, e.g.*, Fed. Election Comm'n v. Wis. Right to Life, Inc., 551 U.S. 449, 457 (2007) (holding that § 203 of the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002), could not constitutionally be applied to a political action group).

205. *See* Richard H. Fallon, Jr., *Fact and Fiction About Facial Challenges*, 99 CALIF. L. REV. 915, 924 (2011) (noting that the common perception of as-applied challenges as a residual category is an unfortunate occurrence because of the resulting imprecision in terminology).

206. *See generally* CHEMERINSKY, *supra* note 7, at 1214 ("The Court stated: '[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter or its content.'" (quoting R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992))).

207. First Amendment law recognizes three types of fora: public fora, designated public fora, and nonpublic fora. *See* Hopper v. City of Pasco, 241 F.3d 1067, 1074–78 (9th Cir. 2001) (quoting

type of discrimination claim can be either a facial challenge[210] or an as-applied challenge.[211]

Ultimately, this system of classification for First Amendment claims is imperfect.[212] Yet it is the framework that exists, so it is the framework in which the analysis must take place. Although the question of whether a First Amendment claim is ripe does not necessarily depend on the type of

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and citing Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 797, 800, 802, 804–05 (1985); Diloreto v. Downey Unified Sch. Dist. Bd. of Educ., 196 F.3d 958, 964–65 & n.4, 968 (9th Cir. 1999); Christ's Bride Ministries, Inc. v. Se. Pa. Transp. Auth., 148 F.3d 242, 244, 250–55 (3d Cir. 1998); Planned Parenthood Ass'n of Chi. Area v. Chi. Transit Auth., 767 F.2d 1225, 1232 (7th Cir. 1985); Cinevision Corp. v. City of Burbank, 745 F.2d 560, 575 (9th Cir. 1984)).

In describing fora, some courts have used the term *limited public forum* as a synonym for a designated public forum, while others have used it as a synonym for a nonpublic forum. *See, e.g.*, Bowman v. White, 444 F.3d 967, 975–76 (8th Cir. 2006) (quoting Ridley v. Mass. Bay Transp. Auth., 390 F.3d 65, 76 n.4 (1st Cir. 2004); Make The Rd. by Walking, Inc. v. Turner, 378 F.3d 133, 139 (2d Cir. 2004); Van Bergen v. Minnesota, 59 F.3d 1541, 1553 n.10 (8th Cir. 1995)) (citing examples of the different uses of "limited public forum"). The proper use of *limited public forum* is not important here.

208. A content-based restriction on speech is not permitted in a public forum. *See, e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377, 395–96 (1992) (holding that a city ordinance prohibiting bias-motivated disorderly conduct was unconstitutional because it was not content-neutral). To be constitutional in a public or designated public forum, a content-neutral restriction of the time, place, or manner of speech must be "narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983) (citing U.S. Postal Serv. v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114, 132 (1981); Consol. Edison Co. v Pub. Serv. Comm'n, 447 U.S. 530, 535–36 (1980); Grayned v. City of Rockford, 408 U.S. 104, 115 (1972); Cantwell v. Connecticut, 310 U.S. 296, 304 (1940); Schneider v. State, 308 U.S. 147, 163 (1939)).

209. A viewpoint-based restriction on speech is not permitted in a nonpublic forum. *See, e.g.*, Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 845–46 (1995) (holding that denying funds to a Christian student newspaper was unconstitutional because the denial was based on the group's religious perspective). A viewpoint-neutral restriction in a nonpublic forum is constitutional if the restriction is reasonable. *See Cornelius*, 473 U.S. at 800 (quoting *Perry Educ. Ass'n*, 460 U.S. at 46).

The Court has recognized that viewpoint discrimination is simply an "egregious form of content discrimination." *Rosenberger*, 515 U.S. at 829. The line between these forms of discrimination may be difficult to discern; however, depending on the type of forum, that line can be the difference between a constitutional and an unconstitutional law.

210. *See, e.g.*, Southworth v. Bd. of Regents of Univ. of Wis. Sys., 307 F.3d 566, 574 (7th Cir. 2002) (noting that the plaintiffs brought a facial challenge to a university's use of mandatory student activity fees).

211. *See, e.g.*, Griffin v. Sec'y of Veterans Affairs, 288 F.3d 1309, 1327 (Fed. Cir. 2002) (treating the plaintiffs' challenge to a regulation regarding national cemeteries as an as-applied challenge).

212. *See, e.g.*, Alex Kreit, *Making Sense of Facial and As-Applied Challenges*, 18 WM. & MARY BILL RTS. J. 657, 659 (2010) (arguing that "important questions remain unanswered because categorizing constitutional cases into 'facial' and 'as-applied' challenges, and relying on these categories to shape doctrine and inform case outcomes, is an inherently flawed and fundamentally incoherent undertaking").

challenge,[213] understanding these various types of challenges is useful in thinking about ripeness and free speech cases because this understanding should remove any potential confusion about the nature of the challenge to a law.

B. The Prevailing View of Ripeness and First Amendment Claims

With this basic understanding of free speech cases, this Part now focuses on how the federal circuit courts have treated ripeness in First Amendment cases. Generally, a consensus exists among these courts that the ripeness requirement should be relaxed in the context of First Amendment cases.[214] Part III.B discusses this consensus, highlighting several cases as examples of how this approach works in practice, and concludes by delving into the rationale for this consensus.

1. The Consensus on Ripeness and the First Amendment

Not all federal circuit courts have expressly addressed ripeness in the First Amendment context; however, courts that have done so have reached the same conclusion: the ripeness requirements are lowered in cases involving a free speech claim.

Of the federal courts of appeals, only the Fifth, Eighth, and Federal Circuits appear not to have had an occasion to decide which ripeness standard applies in First Amendment cases. Every other circuit has decided, when presented with the opportunity, that the ripeness standard is lowered when a case involves free speech, showing that "[c]ourts have been readily willing to find First Amendment freedom of speech issues ripe for review."[215] For instance, the First Circuit held that "when free speech is at issue, concerns over [a] chilling effect call for a relaxation of ripeness requirements."[216] The Second Circuit wrote that, "in the First Amendment context, the ripeness doctrine is somewhat relaxed."[217] The Third Circuit agreed with this view, holding that "[a] First Amendment claim . . . is subject to a relaxed ripeness standard."[218] Similarly, the Fourth

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213. Of course, an as-applied challenge is more likely to be ripe because the facts of such a case are likely to be more developed than the facts of a facial challenge. *See* Renne v. Geary, 501 U.S. 312, 320 (1991) (noting the need for a live controversy and particularized claim). Such is not always the case, however. *See* Peachlum v. City of York, 333 F.3d 429, 438 (3d Cir. 2003) (concluding that the plaintiff's facial First Amendment challenge was ripe).

214. *See* cases cited *infra* notes 207–16.

215. Timothy V. Kassouni, *The Ripeness Doctrine and the Judicial Relegation of Constitutionally Protected Property Rights*, 29 CAL. W. L. REV. 1, 8 (1992).

216. Sullivan v. City of Augusta, 511 F.3d 16, 31 (1st Cir. 2007) (citing El Dia, Inc. v. Hernandez Colon, 963 F.2d 488, 496 (1st Cir. 1992)).

217. Dougherty v. Town of N. Hempstead Bd. of Zoning Appeals, 282 F.3d 83, 90 (2d Cir. 2002).

218. Peachlum v. City of York, Pa., 333 F.3d 429, 434 (3d Cir. 2003) (citing *Dougherty*, 282 F.3d at 90).

Circuit held that "the ripeness analysis is often relaxed in First Amendment cases."[219] The Sixth Circuit used virtually identical language when it stated that the ripeness standard is "relaxed in the First Amendment context."[220] The Seventh Circuit took the same position, holding that "[r]equirements of ripeness are less strictly construed in the [F]irst [A]mendment context."[221] Likewise, the Ninth Circuit observed that ripeness is applied "less stringently in the context of First Amendment claims."[222] The Tenth Circuit agreed that "[t]he customary ripeness analysis . . . is . . . relaxed somewhat" when free speech rights are involved.[223] The Eleventh Circuit used different language but made the same point, holding that, "[i]n First Amendment cases, [the ripeness] test is less exacting."[224] Finally, the D.C. Circuit held that, in First Amendment cases, "the ripeness doctrine has been more loosely applied."[225]

Several cases illustrate this lower ripeness standard, such as the *New Mexicans for Bill Richardson v. Gonzales*[226] case from the Tenth Circuit. In that case, the plaintiffs, Congressman Bill Richardson and his campaign committee, challenged a state election law that prohibited contributions to federal campaigns from being used in state elections.[227] Congressman Richardson had $500,000 on hand, which had been raised during his campaigns for Congress; he and his committee challenged the state law when he was considering running for state office.[228] Richardson claimed that because the funds were not raised with any

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219. Donnangelo v. Myers, 187 F.3d 629, 1999 WL 565834, at *3 (4th Cir. Aug. 2, 1999) (unpublished table decision). Notably, as an unpublished opinion, this decision is not binding precedent.

220. Norton v. Ashcroft, 298 F.3d 547, 554 (6th Cir. 2002) (citing Marchi v. Bd. of Coop. Educ. Servs., 173 F.3d 469, 479 (2d Cir. 1999)).

221. Planned Parenthood Ass'n of Chi. Area v. Kempiners, 700 F.2d 1115, 1122 (7th Cir. 1983).

222. Wolfson v. Brammer, 616 F.3d 1045, 1058 (9th Cir. 2010) (citing Cal. Pro-Life Council, Inc. v. Getman, 328 F.3d 1088, 1094 (9th Cir. 2003)).

223. New Mexicans for Bill Richardson v. Gonzales, 64 F.3d 1495, 1499 (10th Cir. 1995).

224. Fla. Right to Life, Inc. v. Lamar, 273 F.3d 1318, 1323 (11th Cir. 2001) (citing Digital Props., Inc. v. City of Plantation, 121 F.3d 586, 590 (11th Cir. 1997)).

225. Martin Tractor Co. v. Fed. Election Comm'n, 627 F.2d 375, 380 (D.C. Cir. 1980).

226. 64 F.3d 1495. This case is a particularly appropriate example because many cases from other circuits cite *New Mexicans for Bill Richardson* as the basis for the lower ripeness bar in First Amendment cases. *See, e.g.*, Sullivan v. City of Augusta, 511 F.3d 16, 31 (1st Cir. 2007) (quoting *New Mexicans for Bill Richardson*, 64 F.3d at 1499) (discussing the ripeness of a claim); Donnangelo v. Myers, 187 F.3d 629, 1999 WL 565834, at *2 (4th Cir. Aug. 2, 1999) (unpublished table decision) (explaining the ripeness of a case)).

227. *New Mexicans for Bill Richardson*, 64 F.3d at 1497 (quoting N.M. STAT. ANN. § 1-19-29.1B (2012)).

228. *Id.* Although Richardson did not run for state office in the 1990s at the time of this suit, he eventually ran for Governor, serving two terms from 2003 to 2010. Archives and Historical Servs. Div., *New Mexico Governors*, N.M. COMM'N OF PUB. RECORDS, http://www.nmcpr.state.nm.us/archives/governors.htm (last visited Sept. 28, 2013). In the years between this suit and his time as governor, Richardson served as Secretary of Energy in the Clinton Administration. *See* U.S. Dep't of Energy, *Secretaries of Energy*, ENERGY.GOV, http://energy.gov/management/history/secretaries-energy (last visited Sept. 28, 2013).

promises or indications that the money would be used only for federal elections, the $500,000 could be used in a campaign for state office.[229] At the time of the suit, Richardson had not indicated that he was planning to run for any state office, so the district court held the suit was not yet ripe.[230] The court of appeals disagreed, however, observing that the ripeness standard is relaxed in First Amendment cases.[231] The court reasoned that the state law had a direct impact on Richardson's First Amendment rights because the law caused Richardson to revamp his approach to fundraising and the state's apparent intent to enforce the law created a credible threat of enforcement.[232] The case was therefore ripe.[233] Without this lower ripeness standard, however, the ripeness of the case would have been a much closer question.

A second useful case for consideration is the Third Circuit case of *Peachlum v. City of York*.[234] In *Peachlum*, a resident of York brought a facial and as-applied challenge to a city ordinance prohibiting certain types of signs after the city fined her for placing a freestanding, illuminated sign in her yard.[235] After the city denied her request for a permit, Peachlum placed the sign in her yard anyway, and the city fined her $539.[236] She did not properly appeal the fine and eventually sought relief from a federal district court, which held that the case was not ripe because she had not exhausted her administrative remedies.[237] The Third Circuit reversed the district court's decision regarding the ripeness of the case, holding that the case was ripe and thus justiciable.[238] After noting the lower ripeness standard for First Amendment cases,[239] the Third Circuit noted that Peachlum's First Amendment rights had already been allegedly infringed upon, as she faced over $1,000 in fines and costs.[240] Additionally, the court noted that the fee to appeal any decision by the zoning authority presented a steep barrier to administrative finality.[241] Although the Third Circuit may not have had to rely on a lower ripeness standard in *Peachlum* to reach its decision, its use of the lower standard resulted in a definitive finding of ripeness.[242]

This long litany of almost identical quotations and examples of cases is not designed to be tedious; rather, the list is intended to show the consensus that the

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229. *New Mexicans for Bill Richardson*, 64 F.3d at 1497.
230. *Id.* at 1497, 1498.
231. *Id.* at 1499.
232. *See id.* at 1500–01, 1503.
233. *Id.* at 1503.
234. 333 F.3d 429 (3d Cir. 2003).
235. *Id.* at 430–31.
236. *Id.* at 432.
237. *Id.* at 431, 433.
238. *Id.* at 433.
239. *Id.* at 434 (citing Dougherty v. Town of N. Hempstead Bd. of Zoning Appeals, 282 F.3d 83, 90 (2d Cir. 2002)).
240. *Id.* at 437.
241. *Id.*
242. *See id.* at 438 ("It is also clear that Peachlum's claim should be deemed ripe based upon the *Abbott Laboratories* hardship test.").

federal circuit courts have reached on this issue. The circuits that have not decided that the ripeness requirements are relaxed in First Amendment cases—the Fifth, Eighth, and Federal Circuits—also have not reached the opposite conclusion.[243] That is, these courts have not explicitly held that the same ripeness standard applies in First Amendment cases as in other cases.[244] Rather, they have simply applied the same ripeness test in First Amendment cases that they apply in other cases.[245] Although these decisions could plausibly be interpreted as an implicit rejection of the position taken by the majority of circuits, the lack of a discussion of that position suggests that these courts have merely not addressed this question.

Notably, the Supreme Court has not taken up the question of which ripeness standard applies in free speech cases.[246] While the Court has noted the importance of answering questions raised in First Amendment challenges,[247] the Court has never stated that a lower ripeness bar exists for these claims. At the same time, the Court has also never stated that such a lower bar does not exist.[248] Although some federal circuits have cited Supreme Court precedent to support their claims that the ripeness bar is lower in First Amendment cases, that precedent supports only the proposition that First Amendment rights are important—not that their importance necessitates lowering the ripeness requirement.[249] Thus, the question involving the appropriate ripeness standard in

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243. *See, e.g.*, Miss. State Democratic Party v. Barbour, 529 F.3d 538, 547–48 (5th Cir. 2008) (quoting Texas v. United States, 523 U.S. 296, 301 (1998); Monk v. Huston, 340 F.3d 279, 282 (5th Cir. 2003)) (examining whether the case presented a pure legal question and whether further factual development was necessary to determine if the case was ripe); *In re* Workers' Comp. Refund, 46 F.3d 813, 821 (8th Cir. 1995) (quoting Abbott Labs. v. Gardner, 387 U.S. 136, 149 (1967)) (referring to the *Abbott Laboratories* test for ripeness without any qualification in a First Amendment claim).

244. *See, e.g.*, *In re* Workers' Comp. Refund, 46 F.3d at 821 (quoting *Abbott Laboratories*, 387 U.S. at 149) (referring to the *Abbott Laboratories* test for ripeness without any qualification in a First Amendment claim).

245. *See, e.g.*, *id.*; *Barbour*, 529 F.3d at 547–48 (quoting Texas v. United States, 523 U.S. at 301; *Huston*, 340 F.3d at 282) (examining whether the case presented a pure legal question and whether further factual development was necessary to determine if the case was ripe).

246. Stein, *supra* note 95, at 54 (noting that the ripening process could be expedited by federal courts if the "Supreme Court were to relax its ripeness rules expressly").

247. *See* Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 247 n.6 (1974) ("Whichever way we were to decide on the merits, it would be intolerable to leave unanswered, under these circumstances, an important question of freedom of the press under the First Amendment . . . ." (citing Mills v. Alabama, 384 U.S. 214, 221–22 (1966) (Douglas, J., concurring))).

248. *See, e.g.*, Renne v. Geary, 501 U.S. 312, 320–23 (1991) (quoting Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 306 (1979); O'Shea v. Littlejohn, 414 U.S. 488, 495–96 (1974); Int'l Longshoremen's & Warehousemen's Union v. Boyd, 347 U.S. 222, 224 (1954); Rescue Army v. Mun. Court of L.A., 331 U.S. 549, 584 (1947)) (applying normal ripeness analysis in holding that a challenge to an election law was not ripe for review).

249. *See, e.g.*, Pearson v. Leavitt, 189 F. App'x 161, 163 (4th Cir. 2006) (citing the *Forsyth County v. Nationalist Movement* case to support the lower ripeness standard in First Amendment cases despite *Forsyth County* only mentioning the importance of speech, not a lower ripeness requirement (citing 505 U.S. 123, 129–30 (1992))).

First Amendment claims remains without a direct answer from the Supreme Court.

Despite the absence of Supreme Court precedent on point, scholars have treated the general consensus among the circuit courts as the controlling rule. Professor Fallon contrasts the standard for claims under the Takings Clause of the Fifth Amendment with the standard for First Amendment claims, noting that the ripeness bar is lower for free speech claims.[250] Professor Lea Brilmayer also notes the lower ripeness standard that courts use in First Amendment cases.[251] Even Professors Charles Wright and Arthur Miller note in *Federal Practice and Procedure* that "[s]ince First Amendment claims were involved, [*Babbitt*] also may reflect a tacit recognition that asserted injury to First Amendment rights affects the ripeness balance in ways that other injuries may not."[252] These scholars have not, however, delved sufficiently into the reasoning behind this lower standard for ripeness in First Amendment cases.

2. *The Rationale for This Consensus*

Simply knowing what courts have said about ripeness and that scholars generally recognize a particular rule is not enough. The next question—one that is more important—concerns the reason *why* courts have taken this position: the answer that courts have consistently given is the importance of freedom of speech.[253]

The most commonly invoked argument is that application of the normal ripeness requirement would chill speech. For example, in *New Mexicans for Bill Richardson*, the Tenth Circuit reasoned that "the chilling effect that potentially unconstitutional burdens on free speech may occasion" provided a basis for the lower standard in First Amendment cases.[254] The First Circuit also cited the potential "chilling effect" as justification for this altered ripeness standard.[255] Likewise, the Seventh Circuit noted this "chilling effect" when it joined the

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250. *See* Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies—And Their Connections to Substantive Rights*, 92 VA. L. REV. 633, 641–42 (2006) (quoting Nichol, *supra* note 132, at 167) (noting the lower ripeness standard for First Amendment claims compared to claims under the Takings Clause).

251. *See* Lea Brilmayer, *The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement*, 93 HARV. L. REV. 297, 316 (1979) ("[An] example is the leniency of the ripeness doctrine when easily chilled [F]irst [A]mendment rights are at stake."); *see also* Floren, *supra* note 34, at 1115 ("First Amendment cases illustrate the different treatment of ripeness when issues of constitutionality predominate.").

252. 13B WRIGHT, MILLER & COOPER, *supra* note 12, § 3532.3, at 514.

253. *See, e.g.*, New Mexicans for Bill Richardson v. Gonzales, 64 F.3d 1495, 1500 (10th Cir. 1995) (quoting 13B WRIGHT, MILLER & COOPER, *supra* note 12, § 3532.3, at 515).

254. *Id.*

255. Sullivan v. City of Augusta, 511 F.3d 16, 31 (1st Cir. 2007) ("We have said that when free speech is at issue, concerns over chilling effect call for a relaxation of ripeness requirements." (citing El Dia, Inc. v. Hernandez Colon, 963 F.2d 488, 495–96 (1st Cir. 1992))).

consensus on the lower ripeness standard,[256] and the D.C. Circuit did as well.[257] Essentially, the "reasoning is that if an early challenge is not allowed, individuals will forego their rights and the constitutionality of the law will never be litigated."[258] If a person does forego the speech, that person will have suffered an "irretrievable loss."[259] This lower ripeness standard is designed to prevent such a loss and to "more jealously protect[]" free speech rights than other rights.[260]

These statements—many of which come from relatively recent cases—state the rule as gospel, without offering any meaningful discussion of the original nuances of the relaxed ripeness standard. In *New Mexicans for Bill Richardson*, the case on which other circuits have relied heavily in adopting a lower ripeness standard for First Amendment cases,[261] the Tenth Circuit cited *ACORN v. City of Tulsa*.[262] In that First Amendment case, the Tenth Circuit explicitly noted that it saw "no *prudential* reason why the federal courts should not entertain this

256. Planned Parenthood Ass'n of Chi. Area v. Kempiners, 700 F.2d 1115, 1122 (7th Cir. 1983) ("Requirements of ripeness are less strictly construed in the first amendment context due to the chilling effect on protected expression which delay might produce."); *see also, e.g.*, Pearson v. Leavitt, 189 F. App'x 161, 163 (4th Cir. 2006) ("Ripeness requirements are relaxed in First Amendment cases because of the potential chilling effect of unconstitutional restrictions on free speech." (citing Forsyth Cnty. v. Nationalist Movement, 505 U.S. 123, 129–30 (1992))).

257. Nat'l Student Ass'n, Inc. v. Hershey, 412 F.2d 1103, 1113 (D.C. Cir. 1969) ("[I]t appears that suits alleging injury in the form of a chilling effect may be more readily justiciable than comparable suits not so affected with a First Amendment interest.").

258. Brilmayer, *supra* note 251, at 316. *See also* Spartacus Youth League v. Bd. of Trs. of Ill. Indus. Univ., 502 F. Supp. 789, 796–97 (N.D. Ill. 1980) ("Injury to First Amendment rights may result from the threat of enforcement itself, since it may chill the plaintiff's ardor and eliminate his desire to engage in protected expression." (citing Dombrowski v. Pfister, 380 U.S. 479, 487 (1965); 13 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3532, at 245 n.29 (1975))).

259. *New Mexicans for Bill Richardson*, 64 F.3d at 1500 (quoting 13B WRIGHT, MILLER & COOPER, *supra* note 12, § 3532.3, at 515); *see also Nat'l Student Ass'n, Inc.*, 412 F.2d at 1111 ("The peculiar feature of suits alleging a First Amendment chilling effect . . . is that if the allegation is correct, immediate and real injury is done to the plaintiff's interests if he *does not* speak or act as he says he wants to."); *cf.* Sec'y of State of Md. v. Joseph H. Munson Co., 467 U.S. 947, 956 (1984) ("Within the context of the First Amendment, the Court has enunciated other concerns that justify a lessening of prudential limitations on standing. Even when a First Amendment challenge could be brought by one actually engaged in protected activity, there is a possibility that, rather than risk punishment for his conduct in challenging the statute, he will refrain from engaging further in the protected activity. Society as a whole then would be the loser. Thus, when there is a danger of chilling free speech, the concern that constitutional adjudication be avoided whenever possible may be outweighed by society's interest in having the statute challenged.").

260. 13B WRIGHT, MILLER & COOPER, *supra* note 12, § 3532.3, at 515.

261. *See, e.g.*, Dougherty v. Town of N. Hempstead Bd. of Zoning Appeals, 282 F.3d 83, 90 (2d Cir. 2002) (relying on the relaxed standard as exemplified in *New Mexicans for Bill Richardson*).

262. *New Mexicans for Bill Richardson*, 64 F.3d at 1499 (citing ACORN v. City of Tulsa, 835 F.2d 735 (10th Cir. 1987)).

suit."[263] The Tenth Circuit's reasoning in *ACORN* was drawn by analogy to a standing case.[264] But when the Tenth Circuit explicitly held that ripeness should be a less stringent test in the First Amendment context in *New Mexicans for Bill Richardson*, the court did not note that one of the cases on which it was primarily relying focused only on prudential considerations.[265]

Nevertheless, merely because recent cases do not delve into the original reasoning behind the lower ripeness standard does not mean that those cases cannot be logically sound. Ultimately, courts' adoption of the relaxed ripeness standard rests on the exalted place that free speech holds in American constitutional law. The Supreme Court has repeatedly emphasized a special place for the First Amendment.[266] The Court has stated that freedom of speech "lies at the foundation of a free society,"[267] and it has given plaintiffs greater leeway in challenging restrictions on speech than in challenging other types of laws.[268] This emphasis on speech is nothing new; in fact, it can be traced back to the Founding Fathers, whose influence on constitutional law has only grown in recent decades.[269] Thomas Jefferson, for instance, wrote in 1787:

> The basis of our government being the opinion of the people, the very first object should be to keep that right; and were it left to me to decide whether we should have a government without newspapers, or

263. *ACORN*, 835 F.2d at 739 (emphasis added) (quoting Ass'n of Cmty. Org. for Reform Now v. Municipality of Golden, 744 F.2d 739, 745 n.3 (10th Cir. 1984)).

264. *See id.* (quoting *Municipality of Golden*, 744 F.2d at 745 n.3).

265. *See New Mexicans for Bill Richardson*, 64 F.3d at 1499–1500 (quoting Martin Tractor Co. v. Fed. Election Comm'n, 627 F.2d 375, 380 (D.C. Cir. 1980); Nat'l Student Ass'n, Inc. v. Hershey, 412 F.2d 1103, 1110 (D.C. Cir. 1969); 13B WRIGHT, MILLER & COOPER, *supra* note 12, § 3532.3, at 515) (citing Sierra Club v. Yeutter, 911 F.2d 1405, 1410 (10th Cir. 1990)) (adopting a lower ripeness standard without discussing the reasoning of *ACORN*).

266. *See, e.g.*, Palko v. Connecticut, 302 U.S. 319, 326–27 (1937), *overruled on other grounds by* Benton v. Maryland, 395 U.S. 784, 794 (1969) ("[F]reedom of thought, and speech . . . is the matrix, the indispensible condition, of nearly every other form of freedom.").

267. Buckley v. Valeo, 424 U.S. 1, 25 (1976) (per curiam) (quoting Shelton v. Tucker, 364 U.S. 479, 486 (1960)). On the subject of core political speech receiving great protection, see *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 340 (2010) ("[P]olitical speech must prevail against laws that would suppress it, whether by design or inadvertence.").

268. *See, e.g.*, Virginia v. Am. Booksellers Ass'n, Inc., 484 U.S. 383, 392–93 (1988) ("[I]n the First Amendment context, [l]itigants . . . are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." (quoting Sec'y of State of Md. v. Joseph H. Munson Co., 467 U.S. 947, 956–57 (1984))) (internal quotation marks omitted).

269. *See, e.g.*, District of Columbia v. Heller, 554 U.S. 570, 576–619 (2008) (citations omitted) (employing originalism to interpret the Second Amendment). *See generally* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989) (describing the benefits and detriments of originalism as a theory of interpretation).

> newspapers without a government, I should not hesitate a moment to prefer the latter.[270]

Justice Cardozo took a similar view of the freedom of speech, writing that the "freedom [of thought and speech] . . . is the matrix, the indispensible condition, of nearly every other form of freedom."[271] The importance of freedom of speech is reinforced by the fact that it was included in the First Amendment.[272] And fears about chilling this important right provide a rationale for applying a less stringent burden for ripeness in the First Amendment context.

Given the importance of speech in a democratic society, federal courts take their duty to protect that right seriously.[273] Indeed, the duty to protect citizens from overreaching by the other branches of government undergirds the rationale for the lower ripeness standard. For instance, the Third Circuit relied on this justification, observing that "[a]t least in the First Amendment context, it has been held that if the power to threaten to act in a given way influences the exercise of constitutional rights, then the existence of that power can be judicially reviewed as soon as the power is created."[274] Essentially, this is a separation of powers rationale: federal courts have the duty to protect constitutional rights, and when another branch threatens one of these rights, the courts should step in and protect the right that is threatened.

IV. TOWARD A BETTER UNDERSTANDING OF RIPENESS AND FIRST AMENDMENT CLAIMS

Part III described the consensus that federal circuit courts have reached regarding ripeness in the First Amendment context, and it offered a justification for that consensus. This Part now turns to the shortcomings of the consensus and

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270. Letter from Thomas Jefferson to Colonel Edward Carrington (Jan. 16, 1787), *in* JOHN BARTLETT, BARTLETT'S FAMILIAR QUOTATIONS 357 (Justin Kaplan ed., 17th ed. 2002).

271. *Palko*, 302 U.S. at 326–27, *overruled on other grounds by* Benton v. Maryland, 395 U.S. 784, 794 (1969).

272. *See, e.g.*, Burt Neuborne, *"The House Was Quiet and the World Was Calm the Reader Became the Book,"* 57 VAND. L. REV. 2007, 2019 (2004) (footnote omitted) ("The First Amendment is first, not because of random placement, but because the Founders viewed it as the substantive centerpiece of their efforts, a description of the ideal democratic commonwealth they hoped to found."). Of course, as originally proposed in the First Congress, the First Amendment was actually the third proposed amendment. What is now the First Amendment is first only because the states never ratified the first two proposed amendments when the other ten Amendments were ratified in the 1790s. AKHIL REED AMAR, THE BILL OF RIGHTS 257 (1998) (discussing how the First Amendment was not the first proposed amendment but has come to be regarded now as the *first* one).

273. From the earliest days of the United States, federal courts have taken their obligation to declare the law and protect rights seriously. *See, e.g.*, Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule.").

274. Ameron, Inc. v. U.S. Army Corps of Eng'rs, 809 F.2d 979, 987 (3d Cir. 1986).

its rationale. First, Part IV.A challenges the accepted assumption that First Amendment rights deserve or need the relaxed ripeness standard they have been afforded. Second, assuming that a relaxed ripeness standard is proper, Part IV.B demonstrates how the current consensus fails to describe with precision exactly what that lower standard entails.

A. Why First Amendment Rights May Not Deserve or Need a Special Ripeness Standard

Fundamentally, the justification for the relaxed ripeness standard is the preeminence of free speech rights in American constitutional law.[275] Under this lower standard, any chilling effect that a law might have on speech is "unacceptable" because speech is so important.[276] Yet despite the importance of free speech rights, this justification may not prove to be as conclusive as courts have assumed. This Part explores how placing First Amendment rights on such a high pedestal devalues other important rights that are just as critical to American society and how the standard ripeness analysis can adequately protect First Amendment rights, even if those rights deserve preeminence in American constitutional law.

1. Recognizing the Equal Value of Other Constitutional Rights

The Constitution protects many rights: some are the subject of great scholarly debate and others receive virtually no attention.[277] Among the rights that receive much attention are First Amendment rights.[278] Freedom of speech is, undoubtedly, critical to a democratic society such as the United States.[279] In addition to being critical to a democratic society, protecting people's right to free speech is also justified on the grounds that free speech ensures a marketplace of

275. *See supra* notes 266–74 and accompanying text.

276. *See, e.g.*, Hill v. City of Houston, 789 F.2d 1103, 1126 (5th Cir. 1986) (noting "that overly broad statutes can have an unacceptable chilling effect on freedom of speech").

277. Compare, for example, the vast quantity of ink spilt over the First Amendment, Fourth Amendment, Eighth Amendment, or Fourteenth Amendment with the relative dearth of scholarly writing on the Third Amendment. A search on Westlaw's database of federal court cases for "First Amendment," "Fourth Amendment," "Eighth Amendment," and "Fourteenth Amendment" all return the maximum possible number of results (10,000 cases and 10,000 secondary sources), while a search for "Third Amendment" yields only 1,047 cases and 2,360 secondary sources (searches conducted on Oct. 14, 2013).

278. *See supra* note 277 (noting that a search on Westlaw's database of federal court cases for "First Amendment" returns the maximum possible number of results).

279. *See* Keith Werhan, *The Classical Athenian Ancestry of American Freedom of Speech*, 2008 SUP. CT. REV. 293, 296 (2008) ("Classical Athenians and contemporary Americans have regarded freedom of speech as indispensable to their democracies.").

ideas and promotes a search for truth.[280] On these bases, courts reason that free speech rights deserve a lower ripeness standard.[281]

Treating First Amendment rights as the *most* critical rights—in the words of Justice Cardozo, as "the matrix, the indispensible condition, of nearly every other form of freedom"[282]—deemphasizes other constitutional rights that are just as critical to American society. Consider three examples of other rights protected by the Constitution that are just as important to maintaining a democratic society as freedom of speech.[283]

First, the Fourth Amendment protects people from "unreasonable searches and seizures."[284] Although the Court's modern Fourth Amendment jurisprudence may no longer be tethered to the original meaning of the text,[285] the fundamental purpose of the Fourth Amendment is still to protect people from government intrusion into "their persons, houses, papers, and effects" in an inappropriate manner.[286] The Court has recognized this purpose, holding that "[t]he basic purpose of this Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials."[287] Recognizing the critical nature of this right, Justice Frankfurter called it "*basic* to [our] free society."[288]

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280. *See generally* Eugene Volokh, *In Defense of the Marketplace of Ideas/Search for Truth as a Theory of Free Speech Protection*, 97 VA. L. REV. 595 (2011) (discussing various justifications for the protection of the freedom of speech).

281. *See* cases cited *supra* notes 216–225.

282. Palko v. Connecticut, 302 U.S. 319, 327 (1937), *overruled on other grounds by* Benton v. Maryland, 395 U.S. 784, 794 (1969).

283. Of course, a democracy and a republic are not the same, and the Constitution creates a republic, not a democracy. Here, I use *democracy* loosely, in the way that is often used in common vernacular to describe the United States, despite the imprecision of that term.

284. U.S. CONST. amend. IV.

285. *See* AMAR, *supra* note 272, at 64–77 (citations omitted) (discussing the Fourth Amendment's text and the current framework for Fourth Amendment cases); *see also* Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 757 (1994) (arguing that the Fourth Amendment's "text, history, and plain old common sense" do not support the current framework of Fourth Amendment jurisprudence). Naturally, not all scholars agree with Professor Amar's proposal for changing Fourth Amendment jurisprudence. *See generally* David Sklansky, *The Fourth Amendment and Common Law*, 100 COLUM. L. REV. 1739 (2000) (rejecting the trend of basing decisions about the Fourth Amendment on history).

286. U.S. CONST. amend. IV.

287. Camara v. Mun. Court of S.F., 387 U.S. 523, 528 (1967).

288. Wolf v. Colorado, 338 U.S. 25, 27 (1949) (emphasis added), *overruled on other grounds by* Mapp v. Ohio, 367 U.S. 643 (1961), *quoted in Camara*, 387 U.S. at 528.

Other rights in criminal procedure—such as the Fifth Amendment privilege against self-incrimination, the Sixth Amendment rights for criminal defendants, and the Seventh Amendment right to a trial by jury—offer similar protections against government overreach; thus, they are also important rights that ensure the government does not become too powerful. This Article only discusses the Fourth Amendment because of considerations of space and because the Fourth Amendment is widely recognized in American society.

Second, the Fifth Amendment's Takings Clause also provides a fundamental protection from overreaching by government.[289] The Takings Clause declares that the government "shall [not take] private property . . . for public use, without just compensation."[290] Much like the Fourth Amendment, the Takings Clause implicitly recognizes a government power[291]—in the case of the Fifth Amendment, the power of eminent domain[292]—but imposes a restriction on how that power can be exercised by requiring the government to take property only for a public purpose and only by paying fair value for the property.[293] The imposition of this restriction reflected the Framers' belief in protecting private property[294]—an unsurprising goal for the Framers, particularly given the emphasis that influential political philosophers had placed on property rights since long before the creation of the United States.[295] Although the Supreme Court may long ago have abandoned *Lochner v. New York*[296] and similar holdings,[297] the essentiality of property rights to a free market system has not dwindled.[298] Thus, just like the right to be free from government intrusion by

289. *See* U.S. CONST. amend. V.

290. *Id.*

291. *See* United States v. Carmack, 329 U.S. 230, 241–42 (1946) ("[The Fifth Amendment] is a tacit recognition of a preexisting power to take private property for public use, rather than a grant of new power.").

292. *See* U.S. CONST. amend. V. The power of eminent domain, far older than the federal government, may be traced back to England and ancient Rome. *See* JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 1102 (4th ed. 1998) (tracing the history of the eminent domain power).

293. *See* U.S. CONST. amend. V.

294. *See* CHEMERINSKY, *supra* note 7, at 601 ("The framers obviously were concerned about protecting economic rights and thus included in the Constitution provisions such as the Contracts Clause and the Takings Clause.").

295. *See, e.g.*, JOHN LOCKE, TWO TREATISES OF GOVERNMENT 270 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690) (identifying "Possessions," along with "Life, Health, [and] Liberty" as the preeminent rights of individuals).

296. *See* Ferguson v. Skrupa, 372 U.S. 726, 729, 730 (1963) (citing Lochner v. New York, 198 U.S. 45 (1905)) (noting that the *Lochner* doctrine "has long since been discarded").

297. *See id.* at 730 (listing "*Coppage*, *Adkins*, *Burns*, and like cases" as similar holdings that have been abandoned). For a good discussion and an alternative theory of this move away from *Lochner* to embrace President Franklin Roosevelt's New Deal agenda, see generally BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION (1998).

298. *See* MILTON FRIEDMAN & ROSE D. FRIEDMAN, TWO LUCKY PEOPLE: MEMOIRS 605 (1998) (calling property rights "the most basic of human rights and an essential foundation for other human rights"); *see also* Andrew Beckerman-Rodau, *The Problem with Intellectual Property Rights: Subject Matter Expansion*, 13 YALE J. L. & TECH. 35, 41 (2011) ("The existence and recognition of property is a fundamental aspect of a free market economy."). The Supreme Court's minimal protection for economic rights in recent decades has drawn scathing criticism from Judge Janice Rogers Brown of the D.C. Circuit, who argued, "This standard [for protecting economic rights] is particularly troubling in light of the pessimistic view of human nature that animated the Framing of the Constitution—a worldview that the American polity and its political handmaidens have, unfortunately, shown to be largely justified." Hettinga v. United States, 677 F.3d 471, 481 (D.C. Cir. 2012) (Brown, J., concurring).

unreasonable searches and seizures, the right to be secure in one's property is a right that is fundamental to American society.

Third, the right to vote is essential to a free society.[299] Suffrage protections are scattered throughout the Constitution: they are present in Article I, Section 4;[300] the Fifteenth Amendment;[301] the Nineteenth Amendment;[302] the Twenty-Fourth Amendment;[303] and the Twenty-Sixth Amendment.[304] All of these constitutional provisions protect the right to vote, whether by prohibiting a state from denying a citizen the right to vote based on race, gender, or age or through laws that make voting more difficult for some people by requiring a poll tax.[305] These protections make perfect sense; after all, if a republican form of government is based on allowing people to choose their representatives, protecting the right to choose those representatives is essential for the government to exist and function.[306] The Supreme Court has called voting "a fundamental political right, because [it is] preservative of all rights."[307] The right to vote is so important that the Supreme Court has said that "[o]ther rights, even the most basic, are illusory if the right to vote is undermined."[308]

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299. *See* U.S. CONST. art. I, § 4, cl. 1; U.S. CONST. amend. XV, § 1; U.S. CONST. amend. XIX, § 1; U.S. CONST. amend. XXIV, § 1; U.S. CONST. amend. XXVI, § 1.

In some ways, the right to vote may trump the right to free speech. *See, e.g.*, Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 366–67 (2010) (quoting McConnell v. Fed. Election Comm'n, 540 U.S. 93, 201 (2003), *overruled by Citizens United*, 558 U.S. 310; Buckley v. Valeo, 424 U.S. 1, 64, 66 (1976) (per curiam)) (recognizing that the government can compel certain election-related disclosures); Burson v. Freeman, 504 U.S. 191, 211 (1992) (holding that a state law prohibiting political speech within one hundred feet of the entrance to a polling place was narrowly tailored to serve a compelling government interest). The lower ripeness standard for free speech cases, however, indicates a preference for hearing those claims at an earlier stage than voting rights cases, despite the critical nature of voting rights in a democratic society.

300. U.S. CONST. art. I, § 4. Although this section does not explicitly guarantee the right to vote, it implicitly assumes that people have that right. Otherwise, the Constitution would not need to include rules for the time, place, and manner in which elections for members of Congress and the Senate would be held.

301. U.S. CONST. amend. XV, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude[.]").

302. U.S. CONST. amend. XIX, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.").

303. U.S. CONST. amend. XXIV, § 1 ("The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.").

304. U.S. CONST. amend. XXVI, § 1 ("The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.").

305. U.S. CONST. amend. XV, § 1; U.S. CONST. amend. XIX, § 1; U.S. CONST. amend. XXIV, § 1; U.S. CONST. amend. XXVI, § 1.

306. *See* Wesberry v. Sanders, 376 U.S. 1, 17 (1964).

307. Storer v. Brown, 415 U.S. 724, 756 (1974) (Brennan, J., dissenting) (quoting Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886)).

308. *Wesberry*, 376 U.S. at 17.

These three examples—protection from unreasonable searches and seizures, the Takings Clause, and the right to vote—are just a few of the many examples of critical rights besides the right to free speech protected under the Constitution. Although free speech rights are undeniably important to a free and democratic society, claiming that they are more important than these other rights is, at best, a tenuous proposition. After all, the right to vote is the basis of a democracy.[309] Speech may allow citizens to discuss for whom they should vote, but voting itself is what keeps government functioning. Similarly, although protecting private property may not be as fundamental to preserving a republican form of government, it is fundamental to protecting the free market economy the United States has enjoyed for centuries, and it is as central to America's identity as its form of government.[310] Likewise, protections against unreasonable searches and seizures—as well as other protections in criminal procedure—guard against the government becoming too powerful and capable of imprisoning citizens without proof of their guilt.[311] Thus, all three of these rights are, like those included in the First Amendment, important to preserving American society. Free speech may very well "lie[] at the foundation of a free society,"[312] but it does not lie there alone—in other words, it is not a cornerstone on which all of American government and society can rest.[313] Other rights, equally as important, play just as critical a role in ensuring the vitality of a free society.

This argument is admittedly premised on the idea that a right is only valuable if a remedy exists to vindicate it, and in the United States, rights are vindicated through the judicial system.[314] The idea that every right must have a remedy has long been part of American law, going at least as far back as Chief Justice Marshall's decision in *Marbury v. Madison*[315] in 1803;[316] this premise should not be especially controversial. In the context of a lower ripeness standard for free speech claims devaluing other rights, the idea that every right

309. *See supra* notes 306–08 and accompanying text.

310. *See* Beckerman-Rodau, *supra* note 298, at 41 ("The existence and recognition of property is a fundamental aspect of a free market economy."); Daniel Larson, *Yesterday's Technology, Tomorrow: How the Government's Treatment of Intellectual Property Prevents Soldiers from Receiving the Best Tools to Complete Their Mission*, 7 J. MARSHALL REV. INTELL. PROP. L. 171, 185 (2007) ("Many commentators have characterized the United States as a free-market economy.") (citations omitted).

311. *See, e.g.*, Fabio Arcila, Jr., *Special Needs and Special Deference: Suspicionless Civil Searches in the Modern Regulatory State*, 56 ADMIN. L. REV. 1223, 1237 (2004) ("The Framers adopted the Fourth Amendment to limit the government's search power, including its power to conduct suspicionless searches.").

312. Buckley v. Valeo, 424 U.S. 1, 25 (1976) (per curiam) (citing Shelton v. Tucker, 364 U.S. 479, 486 (1960)).

313. *Cf. Ephesians* 2:20 (describing Jesus Christ as "the cornerstone" of the church).

314. *Cf.* Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 274–78 (1997) (citations omitted) (discussing, in the context of federal versus state courts, how courts vindicate rights).

315. 5 U.S. (1 Cranch) 137 (1803).

316. *See id.* at 163 ("The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.").

needs a remedy is particularly apt. Although someone with a Fourth Amendment claim, Takings Clause claim, or voting rights claim could eventually have a ripe case heard in federal court, they would not get a remedy as soon as a person with a First Amendment claim. This difference in timing reflects a difference in perception of the respective rights' importance. A right that courts view as important is more likely to be remedied quickly than a right that is not viewed as important. This difference in timing shows how the lower ripeness standard for free speech claims places this right above others.

In treating free speech rights differently than other important rights, courts do a disservice to these other rights. The difference in treatment effectively announces that those rights are not worthy of such great protection. Why free speech rights have received this extra protection is unclear: perhaps it is because freedom of speech is more accessible to ordinary citizens,[317] or because lawyers and judges depend on the freedom of speech for their professional livelihoods,[318] or because judges genuinely believe First Amendment rights are more important than other rights. None of these explanations, however, justifies the relaxed ripeness standard for free speech claims. First, the fact that the First Amendment is more accessible to ordinary citizens is no reason for shaping justiciability doctrines in a particular way: justiciability itself is far more complicated and nuanced than ordinary citizens would even want to understand, and it is a subject that should maintain internal and external coherency.[319] Second, if courts lower ripeness in the First Amendment context to protect lawyers, such a self-interested justification should be rejected unhesitatingly as unprincipled and lacking coherence to the larger ripeness doctrine. Finally, even if judges do believe that the First Amendment is different, this Article has shown how other rights are equally as important to protecting America's democratic society.

Thus, because the rights protected by the First Amendment are no more important to a democratic society than many other constitutional rights—and because all of these important constitutional rights deserve similar protection—First Amendment rights do not deserve a ripeness standard that is more relaxed than the standard for other constitutional rights.[320]

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317. *See supra* note 1.

318. This explanation is admittedly cynical, and I do not endorse it. Rather, I included it for the sake of providing a more comprehensive list of potential explanations.

319. In fact, to the extent that this argument has any force, it actually counsels for using the same ripeness standard because one standard is likely more easily understood by the public.

320. Using the same ripeness test for all constitutional rights is a better option than using the relaxed test for other important constitutional rights. *See* 13B WRIGHT, MILLER & COOPER, *supra* note 12, § 3532.3, at 530 ("First Amendment rights need not be the only rights accorded special ripeness treatment. Interests in privacy or confidentiality might come to qualify, on the theory that effective remedies are difficult after an invasion has occurred." (footnotes omitted)). The standard ripeness test is sufficient both to protect constitutional rights and to ensure federal courts do not decide disputes that are not cases or controversies under Article III.

2. *How the Standard Ripeness Test Adequately Protects First Amendment Rights*

In addition to the concern that the elevation of free speech rights devalues other rights, First Amendment rights perhaps should be subject to the standard ripeness test for an additional reason: these rights do not need a lower ripeness standard to be protected sufficiently.

The relaxed ripeness standard is typically justified on the basis that if the ripeness standard is not lowered, then speech will be chilled because people will be forced to choose between potential prosecution and foregoing speech.[321] Under this reasoning, other rights impose no such difficult choice before any law that may infringe on those rights is enforced. For example, in comparing the Takings Clause with the Free Speech Clause, the Tenth Circuit wrote:

> [T]o decide if a taking has occurred within the meaning of the [F]ifth [A]mendment, a court must consider "the economic impact of the challenged action and the extent to which it interferes with reasonable investment-backed expectations. Those factors simply cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question." By contrast, a [F]irst [A]mendment challenge to the facial validity of a statute is a strictly legal question; it does not involve the application of the statute in a specific factual setting. Further, unlike an alleged unconstitutional taking, an ordinance that proscribes [F]irst [A]mendment activity inhibits those who would speak but for the threat of criminal sanctions. ACORN, therefore, has already suffered a threatened injury, and its constitutional claims are ripe for decision.[322]

Such is the typical argument as to why First Amendment rights *need* a lower ripeness standard.

But a careful consideration of the standard ripeness test reveals that the test is perfectly capable of protecting First Amendment rights and preventing any chilling effect. The normal ripeness test requires that the issues be fit for judicial review and that a court evaluate the hardship to the parties of withholding review.[323] A plaintiff bringing a First Amendment claim—especially a facial challenge—can generally satisfy the first part of this test because the claim is almost always a legal question focusing on the constitutionality of a law.[324]

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321. *See supra* notes 267–74 and accompanying text.

322. ACORN v. City of Tulsa, 835 F.2d 735, 739–40 (10th Cir. 1987) (quoting Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 191 (1985)).

323. *See supra* Part II.A.

324. *See, e.g.*, Fla. Right to Life, Inc. v. Lamar, 273 F.3d 1318, 1321, 1323–25 (11th Cir. 2001) (citing Abbott Labs. v. Gardner, 387 U.S. 136, 148 (1967); Digital Props., Inc. v. City of

Because a pure question of law is typically fit for judicial review,[325] this prong of the ripeness test is not difficult for a plaintiff with a First Amendment claim to overcome.

Thus, the more important question for determining if the standard ripeness test adequately protects First Amendment rights is whether plaintiffs in these cases can show that hardship exists. The development of the ripeness test has shown that in the context of a preenforcement challenge—a category encompassing many First Amendment claims—a plaintiff can demonstrate hardship by showing a credible threat of enforcement.[326]

Showing a credible threat is not a particularly high hurdle to overcome. In some cases, the threat of enforcement is clear, such as in *Steffel v. Thompson*.[327] In that case, Steffel was told, on threat of arrest, to stop handing out leaflets protesting the Vietnam War.[328] Thus, he faced a credible threat of enforcement.[329] But even in cases in which the threat was not quite so clear from the actions of a government official, courts are likely to infer a credible threat of prosecution. For instance, in *New Hampshire Right to Life Political Action Committee v. Gardner*,[330] the First Circuit wrote that "when dealing with pre-enforcement challenges to recently enacted . . . statutes that facially restrict expressive activity by the class to which the plaintiff belongs, courts will assume a credible threat of prosecution in the absence of compelling contrary evidence."[331]

Of course, because a real threat must exist for a plaintiff to face hardship,[332] distinguishing "between fears that are chimerical and those that are realistic" can be difficult.[333] Despite this difficulty, the burden of showing a credible threat only requires the plaintiff to show that the fear of enforcement is "objectively reasonable."[334] This standard compels a plaintiff to produce a "factual record of an actual or threatened application" of the allegedly unconstitutional law.[335]

Plantation, 121 F.3d 586, 590 (11th Cir. 1997)) (discussing the ripeness of a facial challenge to parts of Florida's campaign finance provisions); New Mexicans for Bill Richardson v. Gonzales, 64 F.3d 1495, 1499–1501 (10th Cir. 1995) (citations omitted) (discussing the ripeness standard and explaining how the state statute created a legal dilemma for Bill Richardson).

325. *See supra* Part II.A.1.

326. *See supra* notes 81–93 and accompanying text.

327. 415 U.S. 452, 475 (1974).

328. *See id.* at 455.

329. *Id.* at 475.

330. 99 F.3d 8 (1st Cir. 1996).

331. *Id.* at 15. Note that although this case focused on standing, rather than on ripeness, the fundamental analysis—whether a credible threat of enforcement exists—applies in both contexts. *See id.* at 10.

332. *See* Norton v. Ashcroft, 298 F.3d 547, 554 (6th Cir. 2002) ("Although the ripeness requirement is somewhat relaxed in the First Amendment context, there nonetheless must be a credible fear of enforcement." (citing Marchi v. Bd. of Coop. Educ. Servs., 173 F.3d 469, 479 (2d Cir. 1999))).

333. R.I. Ass'n of Realtors, Inc. v. Whitehouse, 199 F.3d 26, 31 (1st Cir. 1999).

334. *Id.* (quoting *N.H. Right to Life Political Action Comm.*, 99 F.3d at 14).

335. Woodall v. Reno, 47 F.3d 656, 658 (4th Cir. 1995).

Factors to consider in determining whether such a record has been produced include whether the plaintiff has a "concrete plan to violate the law in question" and whether authorities have issued a "specific warning or threat" to the plaintiff, as well as the history of past prosecution.[336]

This standard of requiring an objectively reasonable threat is essential for ensuring that the bar is not lowered too far—in a manner that would allow adjudication of cases that are not factually developed or cases based on a speculative fear.[337] As for ensuring that a case is factually developed, lowering the bar too far runs the risk of allowing federal courts to decide a case when no concrete controversy exists.[338] Given that showing a credible threat is already a relatively low bar, pushing the bar any lower risks allowing courts to hear cases without parties that would face a truly meaningful hardship if review is withheld, as no "live controversy" exists between the plaintiff and defendant.[339]

As for ensuring that an unreasonable fear is not the basis of a case, the objectively reasonable basis for showing a credible threat of enforcement protects courts from hearing cases only because a particular plaintiff is unusually sensitive to a perceived threat.[340] The law often rejects such hypersensitivity as a basis for a claim. In tort law, for instance, a battery claim requires that a touching be offensive based on a standard of objective reasonableness, not based on a plaintiff's individual sensitivities.[341] Similarly, in the context of ripeness, a plaintiff should not be deemed to face a hardship sufficient to meet the ripeness standard merely because that person perceives a threat of chilled speech. Adopting such a subjective test would so relax the requirements for filing a justiciable claim that eager litigants could get their cases into federal court with relatively little effort, simply alleging a fear of not being able to speak without showing any concrete desire to actually engage in that speech.

Examining a few First Amendment ripeness cases demonstrates how the standard ripeness test can sufficiently protect First Amendment rights. In some cases, such as *Peachlum*, the case is clearly ripe under the standard test.[342] In that case, the plaintiff had actually exercised her right to speak and had been

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336. Wolfson v. Brammer, 616 F.3d 1045, 1058 (9th Cir. 2010) (citing San Diego Cnty. Gun Rights Comm. v. Reno, 98 F.3d 1121, 1126–29 (9th Cir. 1996)).

337. *See N.H. Right to Life Political Action Comm.*, 99 F.3d at 14.

338. Federal courts, of course, cannot issue advisory opinions. *See supra* note 68.

339. *See, e.g.*, Renne v. Geary, 501 U.S. 312, 320 (1991) (requiring a live controversy or dispute involving the challenged statute).

340. *See, e.g.*, *N.H. Right to Life Political Action Comm.*, 99 F.3d at 14 (noting that "[a] party's subjective fear that she may be prosecuted" does not meet the objectively reasonable test).

341. *See, e.g.*, Brzoska v. Olson, 668 A.2d 1355, 1361 (Del. 1995) ("Although a battery may consist of any unauthorized touching of the person which causes offense or alarm, the test for whether a contact is "offensive" is not wholly subjective. The law does not permit recovery for the extremely sensitive who become offended at the slightest contact. Rather, for a bodily contact to be offensive, it must offend a *reasonable* sense of personal dignity." (citing RESTATEMENT (SECOND) OF TORTS § 19 (1965))).

342. *See supra* notes 234–42 and accompanying text.

fined.[343] It is difficult to imagine any federal court not finding that case ripe.[344] Thus, for cases like *Peachlum*, the standard ripeness test sufficiently protects First Amendment rights.

Other cases present closer questions. For example, in *Wolfson v. Brammer*,[345] an Arizona lawyer challenged provisions of the Arizona Code of Judicial Conduct.[346] Although the lawyer had already lost an election and did not intend to run in a future election, he "alleged that he wanted to engage in certain campaign-related activities and political speech but refrained from doing so, believing that the activities [were] prohibited by . . . the Code."[347] Noting the relaxed ripeness standard for First Amendment cases, the Ninth Circuit held that Wolfson's challenges to all provisions but one were ripe because Wolfson had sufficiently alleged a specific plan to engage in the proscribed conduct and had censored himself to avoid prosecution, thereby suffering a hardship that merited immediate judicial decision on his claims.[348]

Whether the *Wolfson* case would have been ripe under the standard ripeness test is a far closer question than whether the claims in *Peachlum* would have been ripe. Despite being a closer question, *Wolfson* still likely would have been ripe under the standard test. The plaintiff had been clear in his intention to engage in conduct involving a constitutional interest that would violate the law at issue.[349] This factor carries great weight in determining whether a party faces a

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343. Peachlum v. City of York, 333 F.3d 429, 432 (3d Cir. 2003).

344. This case involved some issues of administrative finality and exhaustion of administrative remedies, but the court held that those were of no concern because of the judgments already entered against Peachlum and the clearly adversarial positions of the parties. *See Peachlum*, 333 F.3d at 437. The court also stated that a facial First Amendment challenge could be ripe "even during the pendency of an administrative proceeding." *Id.* at 438. The concerns about administrative finality could be a reason for finding that this case was not ripe; however, if the final administrative formalities had been completed, and if the parties otherwise had been in the exact same position, the case would unquestionably be ripe.

345. 616 F.3d 1045 (9th Cir. 2010).

346. *Id.* at 1051.

347. *Id.* at 1052.

348. *Id.* at 1059–62 (citations omitted).

349. *See id.* at 1059 (citing Thomas v. Anchorage Equal Rights Comm'n, 220 F.3d 1134, 1139 (9th Cir. 2000)). Note that some courts do not require a plaintiff to allege an intent to engage in the conduct, but merely a credible threat of enforcement if the plaintiff were to engage in the proscribed conduct. *See, e.g.*, BNSF Ry. Co. v. Box, 470 F. Supp. 2d 855, 836, 864 (C.D. Ill. 2007) (quoting and citing Babbitt v. United Farm Works Nat'l Union, 442 U.S. 289, 293, 298–301 (1979)) (explaining that *Babbitt* stands for the proposition that a case may be ripe "even in the absence of an allegation that the plaintiffs intended to engage in any conduct prohibited by" the challenged statute). The *Box* court's reading of *Babbitt*, however, is misguided. In *Babbitt*, the Court noted that further factual development showing that the plaintiffs actually participated in an election was unnecessary to decide the case. *See Babbitt*, 442 U.S. at 300–01. The Court did not say that the plaintiffs had no intention *not* to engage in the conduct regulated by the law at issue; rather, the Court simply said that further factual development was not necessary to bring the issues into clearer focus for the case to be decided. *See id.* A better view is expressed in *Norton v. Ashcroft*, in which the court said, "In a First Amendment pre-enforcement challenge, the inquiry usually focuses on how imminent the threat of prosecution is and whether the plaintiff has sufficiently alleged an

credible threat—and thus a significant hardship—not only in First Amendment cases, but also in other types of cases.[350] The intent to engage in the conduct prohibited by the Code of Judicial Conduct, along with the neatly framed legal question of the code's constitutionality, suggests that this case would have been ripe even without the relaxed ripeness standard.[351]

The fact that some cases may not be ripe under the standard ripeness test, even though such cases would have been ripe under the relaxed test, is of no great concern. Any case that could be ripe only under the lower standard is of questionable ripeness already. If the speech is truly important, someone will almost certainly allege an intent to engage in that speech so that the person will be able to present a ripe case under the standard ripeness test.[352] After all, the bar for showing a hardship is not *that* high under the standard test.[353] Not requiring a plaintiff to show even that level of hardship leaves too great a possibility of hearing cases involving abstract legal questions without a concrete underlying factual dispute.[354]

First Amendment claims, therefore, do not need the relaxed ripeness standard. The normal ripeness standard provides all of the protection that First Amendment rights need to ensure that claims can be heard by federal courts when those rights are allegedly violated. Lowering the ripeness bar is not necessary to protect the freedom of speech; rather, lowering the bar only risks having federal courts decide cases based on merely abstract legal questions without a real, concrete dispute. Such abstract questions would be more fit for a law review article than a federal court.

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intention to refuse to comply with the statute." 298 F.3d 547, 554 (6th Cir. 2002) (citing Nat'l Rifle Ass'n of Am. v. Magaw, 132 F.3d 272, 285 (6th Cir. 1997)).

350. *See, e.g.*, Pharm. Research & Mfrs. of Am. v. Nicholas, 353 F. Supp. 2d 231, 246 (D.R.I. 2005) (noting that the plaintiff had not alleged an intention to engage in conduct affected with a constitutional interest to have a ripe case in the context of the Commerce Clause and federal preemption).

351. Earlier, this Article suggested that *New Mexicans for Bill Richardson* would be a closer question under the standard ripeness test. *See supra* notes 191–98 and accompanying text. That case would most likely have been ripe under the standard test for the same reasons that *Wolfson* would likely have been ripe under this standard.

352. *See, e.g.*, *Wolfson*, 616 F.3d at 1051, 1059 (citing Thomas v. Anchorage Equal Rights Comm'n, 220 F.3d 1134, 1139 (9th Cir. 2000)) (determining that Wolfson established the requisite intent to engage in the barred political speech).

353. *See supra* Part II.A.2.

354. *See* Golden v. Zwickler, 394 U.S. 103, 108 (1969) ("[T]he federal courts established pursuant to Article III of the Constitution do not render advisory opinions. For adjudication of constitutional issues 'concrete legal issues, presented in actual cases, not abstractions' are requisite." (quoting United Pub. Workers v. Mitchell, 330 U.S. 75, 89 (1947))).

B. How the Current Consensus Fails to Describe with Precision What the Relaxed Standard Entails—and the Dangers of This Lack of Precision

As demonstrated above, because other constitutional rights are equally important and the standard ripeness test adequately protects free speech rights, free speech claims do not deserve a relaxed ripeness standard. Part IV.B demonstrates how, even accepting the propriety of a relaxed ripeness standard for First Amendment cases, the current consensus among the federal courts of appeals lacks the necessary precision to protect the constitutional foundations of ripeness.

The most glaring problem with the relaxed ripeness standard is that this relaxed standard—as courts currently articulate it—lacks any definition for what *relaxed* means. Looking back to the quotations from circuit court cases stating this relaxed standard for First Amendment claims, it is notable that all of these decisions made a simple, one-sentence statement about the test.[355] As an example, the following is the Seventh Circuit's entire statement of the rule: "Requirements of ripeness are less strictly construed in the [F]irst [A]mendment context due to the chilling effect on protected expression which delay might produce."[356] The court offered no further explanation.[357] Even the Tenth Circuit in *New Mexicans for Bill Richardson*—arguably the case that discusses the relaxed ripeness standard in the greatest depth—offered only a discussion of *why* First Amendment claims should have a relaxed standard, without discussing *what* that relaxed standard means in practice.[358]

With virtually no guidance from the federal courts of appeals regarding how the relaxed ripeness standard functions, one is left to theorize and draw conclusions from the case law. The relaxed ripeness test could affect, at least potentially, either the constitutional or prudential basis of the doctrine. Of the greatest concern is that this lower standard affects the constitutional basis of ripeness. Because Article III limits federal courts to deciding only cases or controversies—thereby prohibiting advisory opinions[359]—all cases must meet a certain threshold before a court can hear them.[360] Thus, the relaxed ripeness standard cannot permit a finding of ripeness if the case does not meet this

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355. *See* cases cited *supra* notes 216–25 and accompanying text.

356. Planned Parenthood Ass'n of Chi. Area v. Kempiners, 700 F.2d 1115, 1122 (7th Cir. 1983).

357. *See id.*

358. *See* New Mexicans for Bill Richardson v. Gonzales, 64 F.3d 1495, 1499–1500 (10th Cir. 1995) (offering no indication of how the relaxed ripeness standard functions differently than the traditional test).

359. *See, e.g.*, United Pub. Workers v. Mitchell, 330 U.S. 75, 89 (1947) ("As is well known, the federal courts established pursuant to Article III of the Constitution do not render advisory opinions."); *see generally* Pushaw, *supra* note 67 (providing historical background on the development of this rule).

360. *See Mitchell*, 330 U.S. at 90 (noting the separation of powers concerns that arise by allowing federal courts to consider cases not "capable of effective determination").

threshold. Yet most courts rarely are sufficiently clear about what part of the ripeness test is the constitutional core of the doctrine.[361] Some courts have tried to delineate these differences more clearly. The Ninth Circuit, for instance, has stated that the constitutional inquiry focuses on "whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between the parties having adverse legal interests;"[362] the prudential inquiry focuses on the two factors from the *Abbott Laboratories* test.[363] But this articulation has never taken hold among a majority of courts, and the Supreme Court has never embraced it.[364] Hence, a lack of guidance about the constitutional core of ripeness remains, and allowing the relaxed ripeness standard to apply to free speech claims risks cutting into this core. If these concerns prove to be valid, and the lower ripeness standard does affect the constitutional basis for the doctrine, then lowering the standard may very well be unconstitutional.

Nevertheless, putting aside these legitimate concerns about infringing on the constitutional requirements of ripeness, the relaxed ripeness standard is more likely to affect the prudential basis of ripeness. From one of the Court's earliest discussions of ripeness in *Mitchell*[365] to more recent discussions in the past few Terms,[366] the Court has been steadfast in its view that a plaintiff must meet the threshold requirement of constitutional ripeness.[367] Although constitutional provisions are not always absolute,[368] the Court has never suggested that the constitutional requirements for ripeness can vary depending on the basis of the claim.[369]

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361. *See, e.g.*, Stolt-Nielsen S.A. v. Animalfeeds Int'l Corp., 559 U.S. 662, 670 n.2 (2010) (quoting Nat'l Park Hospitality Ass'n v. Dep't of Interior, 538 U.S. 803, 808 (2003); Reno v. Catholic Soc. Servs., Inc., 509 U.S. 43, 57 n.18 (1993)) (citing Sprietsma v. Mercury Marine, 537 U.S. 51, 56 n.4 (2002)) (noting that ripeness contains both constitutional and prudential considerations and holding that the case was ripe without explaining which aspects were constitutional and which aspects were prudential).

362. *See In re* Coleman, 560 F.3d 1000, 1005 (9th Cir. 2009) (quoting United States v. Braren, 338 F.3d 971, 975 (9th Cir. 2003)).

363. *Id.* at 1006.

364. *See, e.g.*, *Stolt-Nielsen S.A.*, 559 U.S. at 670 n.2 (declining to express a view regarding whether "a federal court may consider a question of prudential ripeness on its own motion").

365. *See Mitchell*, 330 U.S. at 90 ("Unless these courts respect the limits of [Article III], they intrude upon powers vested in the legislative or executive branches.").

The focus on the constitutional nature of the Court's decision in *Mitchell* has prompted one scholar to call the decision "the high-water mark of a stringent ripeness doctrine." Adler, *supra* note 25, at 169.

366. *See, e.g.*, *Stolt-Nielsen S.A.*, 559 U.S. at 670 n.2 ("Ripeness reflects constitutional considerations that implicate 'Article III limitations on judicial power,' as well as 'prudential reasons for refusing to exercise jurisdiction.'" (quoting *Reno*, 509 U.S. at 57 n.18)).

367. Babbitt v. United Farm Works Nat'l Union, 442 U.S. 289, 297 (1979).

368. *See, e.g.*, N.Y. Times Co. v. United States, 403 U.S. 713, 749 (1971) (Burger, C.J., dissenting) ("Of course, the First Amendment right itself is not an absolute, as Justice Holmes so long ago pointed out in his aphorism concerning the right to shout 'fire' in a crowded theater if there was no fire.").

369. Stein, *supra* note 95, at 54 (noting that the ripening process could be expedited by federal courts if the "Supreme Court were to relax its ripeness rules expressly").

With no apparent room for lowering the constitutional requirement of ripeness, the relaxed ripeness standard must therefore affect the doctrine's prudential considerations. Of course, such nonconstitutional prudential considerations are in a court's discretion, meaning that a court "is always free to modify [them]."[370] The Supreme Court has embraced, at least in the closely related context of standing, "a lessening of *prudential* limitations" in First Amendment cases.[371] Given the close connection between standing and ripeness, lowering the prudential considerations in the ripeness doctrine—rather than the constitutional ones—seems logical.[372]

Additionally, earlier precedents support viewing the relaxed ripeness standard as affecting the prudential considerations of the doctrine. In *ACORN v. City of Tulsa*, the case that was so influential to the court's decision in *New Mexicans for Bill Richardson*,[373] the Tenth Circuit emphasized that no *prudential* considerations kept the court from deciding the case.[374] The court cited *ACORN v. Golden*,[375] a standing case in which the Tenth Circuit noted the fact that no prudential considerations suggested the court "should not entertain th[e] suit" involving a facial challenge to a particular law.[376] This conclusion is further supported by the Third Circuit's decision in *Felmeister v. Office of Attorney Ethics*,[377] in which the court wrote: "The ripeness doctrine, like other justiciability doctrines, derives ultimately from the requirement in Article III of the United States Constitution that federal courts are empowered to decide cases and controversies. Even when the constitutional minimum has been met, however, prudential considerations may still counsel judicial restraint."[378] Given these judicial decisions and the ability of courts to tweak judicially imposed prudential requirements, the relaxed ripeness standard must affect the prudential prong of ripeness.

Having resolved the issue of what part of the ripeness test the lower standard affects, this Part now moves to another question: To what extent is the standard test relaxed? Is it relaxed to the point of being essentially nonexistent? Is it

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370. *Id.* at 54 ("[T]o the extent that the ripeness test is prudentially based, the Court is always free to modify it.").

371. Sec'y of State of Md. v. Joseph H. Munson Co., 467 U.S. 947, 956 (1984) (emphasis added).

372. *See* Floren, *supra* note 34, at 1115–16 (quoting *Joseph H. Munson Co.*, 467 U.S. at 956; Dombrowski v. Pfister, 380 U.S. 479, 486, 487 (1965)) (citing Nichol, *supra* note 132, at 155–56)) (making this exact assumption by applying the reasoning from *Joseph H. Munson Co.* to ripeness).

373. *See* New Mexicans for Bill Richardson v. Gonzales, 64 F.3d 1495, 1498–1500, 1504 (10th Cir. 1995) (quoting ACORN v. City of Tulsa, 835 F.2d 735, 740 (10th Cir. 1987)).

374. *See ACORN*, 835 F.2d at 739 (quoting and citing Ass'n of Cmty. Org. for Reform Now v. Municipality of Golden, 744 F.2d 739, 745 n.3 (10th Cir. 1984)).

375. *See id.* (quoting *Municipality of Golden*, 744 F.2d at 745 n.3).

376. *Id.*

377. 856 F.2d 529 (3d Cir. 1988).

378. *Id.* at 535 (quoting Action Alliance of Senior Citizens of Greater Phila. v. Heckler, 789 F.2d 931, 940 n.12 (D.C. Cir. 1986)) (internal quotation marks omitted).

relaxed to some extent, but not so much as to all but eliminate it? Is the extent of the relaxation dependent on the facts of each case?[379]

The case law provides no meaningful guidance on this question because, unfortunately, most decisions do not actually note how the lowered standard is affecting the analysis. For instance, in *Sullivan v. City of Augusta*,[380] the First Circuit simply noted that Sullivan believed he would be denied a permit for a parade because the time frame for applying for a permit based on the date on which the parade was scheduled had passed; accordingly, he did not apply for the permit and did not hold the parade.[381] Without mentioning any prudential considerations, the court simply stated that these facts made the case ripe.[382] On the other hand, in *Norton v. Ashcroft*,[383] the Sixth Circuit held that—even under the relaxed ripeness standard—the case was not ripe because, despite ambiguity in the challenged law, the plaintiff had not changed his conduct and could not show a credible threat of enforcement.[384] In fact, it is hard to find a First Amendment case in which a court explicitly mentioned prudential considerations and decided that the case was not ripe. One of the few cases in this category is *Alaska Right to Life Political Action Committee v. Feldman*, a Ninth Circuit case in which the court held that the plaintiff's claim was unripe because the plaintiff had not shown that hardship would result if the case was not decided at that time.[385]

The problem with these and other similar cases from the federal circuit courts is that they never explain how the lower ripeness standard affects the analysis. They do not note, for example, whether the case would have turned out differently had the court applied the standard ripeness test—rather than the special First Amendment test.[386] Instead of offering such helpful analysis, these cases simply undertake what appears to be a normal ripeness analysis,[387] effectively leaving scholars and lawyers guessing as to how low the bar actually goes in First Amendment cases and what prudential considerations, if any, would keep a court from holding that a free speech claim is not ripe.

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379. This last option reflects the view of some scholars that ripeness is unavoidably intertwined with the merits of the claim. *See* Amar, *supra* note 165, at 718 n.155 (commenting that "ripeness obviously turns on one's conception not of [A]rticle III, but of the substantive interests asserted").

380. 511 F.3d 16 (1st Cir. 2007).

381. *Id.* at 31.

382. *See id.*

383. 298 F.3d 547 (6th Cir. 2002).

384. *Id.* at 554.

385. 504 F.3d 840, 850–51 (9th Cir. 2007).

386. *See, e.g.*, New Mexicans for Bill Richardson v. Gonzales, 64 F.3d 1495, 1499–1504 (10th Cir. 1995) (citations omitted) (failing to address the claim under the standard analysis). *But see* Peachlum v. City of York, 333 F.3d 429, 438 (3d Cir. 2003) (noting that the claim would be ripe under the *Abbott Laboratories* hardship test).

387. *See, e.g.*, *New Mexicans for Bill Richardson*, 64 F.3d at 1499–1504 (citations omitted) (applying the two-factor *Abbott Laboratories* analysis and simply claiming that it is relaxed).

Perhaps one could delve into district court decisions and use traditional common law reasoning to find some insight into what the relaxed ripeness standard means, but the decisions from the district courts are too contradictory to contain any consistent rules. Some of the cases seem straightforward. For example, the Eastern District of New York held that, even under the relaxed ripeness test, "uncertainty about enforcement" of a law was insufficient to meet the threshold for showing a credible threat of enforcement.[388] But other cases offer divergent guidance.[389] The Middle District of Florida, for example, held that a challenge to a suspension of an adult entertainment business's license was not ripe because the government agency had not issued a final decision.[390] Yet in a case in the Eastern District of Virginia, the government agency's argument that its interest in issuing a final decision meant that the case was not ripe did not prevail, and the court instead held that the case was ripe.[391] These examples illustrate how the district court decisions offer only limited insight into what the relaxed ripeness standard means. Thus, the federal circuit courts need to offer more guidance regarding how the relaxed ripeness standard operates in practice.

If federal courts continue using the lower ripeness standard for First Amendment claims, then they must offer more concrete guidance on how that lower standard impacts the analysis of ripeness in such cases. Although scholars can deduce that this lower standard affects the prudential, rather than constitutional, basis of ripeness, exactly how much lower the prudential considerations are remains unclear. Even if free speech claims deserve or need a lower ripeness standard, courts ought to make that lower standard clear for lawyers, litigants, and scholars. A more comprehensive explanation of how the lower standard affects judicial decisionmaking would shed light on the relaxed ripeness standard that courts so often note applies in First Amendment cases.[392] Yet courts have consistently failed to give such guidance, and this failure has served only to confuse and muddle the ripeness doctrine.

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388. *See* Sanger v. Reno, 966 F. Supp. 151, 161 (E.D.N.Y. 1997).

389. *See, e.g.*, Beeline Entm't Partners, Ltd. v. Cnty. of Orange, 243 F. Supp. 2d 1333, 1339 (M.D. Fla. 2003) (citing Digital Props., Inc. v. City of Plantation, 121 F.3d 586, 590 (11th Cir. 1997)).

390. *See id.*

391. *See* Allen, Allen, Allen & Allen v. Williams, 254 F. Supp. 2d 614, 626 (E.D. Va. 2003) (citing Elrod v. Burns, 427 U.S. 347, 373 (1976)).

392. Providing clarity allows for a more meaningful and useful discussion of an issue. *See, e.g.*, Wm. Grayson Lambert, Note, *The Real Debate over the Senate's Role in the Confirmation Process*, 61 DUKE L.J. 1283, 1324–27 (2012) (clarifying the true tension between approaches to the Senate's role in the confirmation of judges in an effort to provide a framework for meaningful discussions regarding how the Senate should approach its constitutional duty to advise and consent to judicial nominations).

V. CONCLUSION

Like many justiciability doctrines, ripeness is far from clear or easy. One area in which courts have generally reached a consensus concerns ripeness and free speech claims: the normal ripeness test is relaxed in these cases because of the importance of free speech rights and the need to protect speech from any potential chilling effect.

Although this consensus is appealing because it offers some stability in the law, it is not as logically sound as it is often thought to be. First, the value placed on free speech rights ignores the importance of other constitutional rights, which are effectively devalued when free speech rights are put on a pedestal in the ripeness doctrine. Second, the normal ripeness test likely provides sufficient protection to ensure that free speech rights are not improperly threatened. And third, even if free speech rights deserve or need this relaxed ripeness standard, the current consensus offers insufficient guidance as to how this standard actually functions. Therefore, courts should apply the standard ripeness test in free speech cases to promote a better understanding of ripeness and free speech claims.

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